No. 96-272-CFX Title: Metropolitan Stevedore Company, Petitioner
v.
John Rambo, et al.

Docketed: August 19, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 19 1996	Petition for writ of certiorari filed. (Response due October 18, 1996)
	Sep 13 1996	Order extending time to file response to petition until October 18, 1996.
	Sep 13 1996	This extension is granted for all respondents.
	Sep 13 1996	Brief of respondent John Rambo in opposition filed.
	Oct 1 1996	Reply brief of petitioner Metropolitan Stevedore Company filed.
	Oct 18 1996	Brief of the Federal Respondent in opposition filed.
	Oct 30 1996	DISTRIBUTED. November 15, 1996
	Nov 22 1996	REDISTRIBUTED. November 27, 1996
	Nov 27 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 13, 1997. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 12, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 3, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT March 17, 1997. **********
	Jan 10 1997	Motion of National Association of Waterfront Employers, et al. for leave to file a brief as amici curiae filed.
	Jan 10 1997	Brief of Director, Office of Workers' Compensation Programs filed.
	Jan 13 1997	Joint appendix filed.
	Jan 13 1997	Brief of petitioner Metropolitan Stevedore Company filed.
	Jan 13 1997	Motion of National Steel and Shipbuilding Company for leave to file a brief as amicus curiae filed.
	Jan 21 1997	Motion of National Association of Waterfront Employers, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 21 1997	Motion of National Steel and Shipbuilding Company for leave to file a brief as amicus curiae GRANTED.
	Feb 11 1997	Brief of respondent John Rambo filed.
	Feb 19 1997	CIRCULATED.
	Feb 24 1997	Motion of the Acting Solicitor General for divided argument filed.
	Feb 28 1997	Reply brief of Director, Office of Workers' Compensation Programs filed.
	Mar 3 1997	Motion of the Acting Solicitor General for divided argument GRANTED.
	Mar 3 1997	Record filed.
	Mar 12 1997	Record filed.
	Mar 17 1997	ARGUED.

No. 96-___

In The

Supreme Court of the United States

October Term, 1995

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTION PRESENTED

When Congress has clearly stated that rights to modify Longshore and Harbor Workers' Compensation Act awards should end one year after the last payment of compensation, may a Court of Appeals order a small award "fashioned expressly" to indefinitely extend that period?

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs, United States Department of Labor

[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Metropolitan Stevedore Company (hereinafter "Metropolitan") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit (Appendix 2a) is reported at 81 F.3d 840. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (App. 1a) is unpublished. The Opinion of the Ninth Circuit originally reversed by this Court (App. 17a) is reported at 28 F.3d 86. The Decision and Order of the Benefits Review Board (App. 21a) and the Administrative Law Judge's Decision and Order Granting Modification (App. 26a) are unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 10, 1996. (App. 2a) A timely Petition for Rehearing filed by Metropolitan was denied on May 22, 1996. (App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 22 of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. Section 922, provides in relevant part as follows:

MODIFICATION OF AWARDS

> Sec. 22. Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . , the deputy commissioner may *at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim,* review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. [emphasis added]

STATEMENT

Much of the factual background pertinent to the question presented was summarized within this Court's opinion in *Metropolitan Stevedore Co. v. Rambo (Rambo I),* 115 S.Ct. 2144 (1995).

> In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge. After Rambo and petitioner

> stipulated that Rambo sustained a 22 1/2 % permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA § 8(c)(21) awarded Rambo 66 2/3 % of that figure, or $80.16 per week.
>
> After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his pre-injury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner . . . filed an application to modify the disability award under LHWCA § 22. Petitioner asserted there had been a 'change in conditions' so that respondent was no longer 'disabled' under the Act. The ALJ agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage increases due to inflation and considering petitioner's risk of job loss and other employment prospects, the ALJ concluded Rambo 'no longer has a wage-earning capacity loss' and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F.2d 1225 (CA4 1985), which held that 'change in condition[s]' means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo v. Director,* OWCP, 28

> F.3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood*, the Ninth Circuit held that LHWCA § 22 authorizes modification of an award only where there has been a change in the claimant's physical condition. We granted certiorari to resolve this split, 513 U.S. ___, 115 S.Ct. 787, 130 L.Ed.2d 779 (1995), and now reverse.

Rambo I, 115 S.Ct. at 2146-47.

This Court reversed because the Ninth Circuit had disregarded the plain language of the statute and had applied a definition of "change in conditions" which was inconsistent with the structure, purpose, and history of the LHWCA. Because Rambo had raised other arguments which the Ninth Circuit had not addressed, the case was remanded for further proceedings consistent with this Court's opinion.

On remand, the Ninth Circuit reversed the Order terminating Rambo's benefits and ordered entry of a small award

> [F]ashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him.

Rambo v. Director, Office of Workers' Compensation Programs (Rambo II), 81 F.3d 840, 844 (9th Cir. 1996). (App. 14a)

The Ninth Circuit acknowledged that entry of the small award would indefinitely extend the statute's one-year limitation period. However, it thought indefinite extension appropriate because Rambo might at some future time suffer economic harm and because the Ninth

Circuit perceived no statutory protections against that possibility.

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism. . . .

Rambo II, 81 F.3d at 844. (App. 13a) A Request for Rehearing was filed for Metropolitan. The request was denied and the accompanying Suggestion for Rehearing *En Banc* rejected.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an important question of federal law in a way that *cannot* be reconciled with either this Court's opinion in *Rambo I* or Congress's clearly expressed judgment that there should be a one-year limitation on the period during which a party may seek modification.

The statutory language could not be more clear. Section 22 permits modification *only* within "one year after the date of the last payment of compensation . . . [or] one year after the rejection of a claim." In *Rambo I*, this Court directed the Ninth Circuit to base its conclusions upon the language of the statute, expressly noting that Congress has repeatedly declined to extend the one-year limitations period. *Rambo I*, 115 S.Ct. 2144, 2149. In *Rambo II*, the Ninth Circuit substituted its judgment for that of

Congress and disobeyed this Court's repeated admonition that only Congress has the authority to change statutes.

These circumstances call for an exercise of this Court's power of supervision and a ruling which makes clear to the Ninth Circuit that, however much it may question Congress's wisdom or fairness, it *must* enforce the Legislature's clearly expressed judgments.

The Ninth Circuit's refusals to obey Congress's judgment and this Court's repeated rulings that clearly stated legislative choices must be implemented are not the only reasons for review. In its singular haste to imprint its own perceptions of wisdom and fairness upon the statutory language, the Ninth Circuit once again rejected the interpretation of Section 22 adopted by the Fourth Circuit in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) and, once again, prevented the uniform application which the LHWCA requires.[2]

Unless *Rambo II* is reversed, maritime employers within the Ninth Circuit will be required to pay compensation benefits to workers who *may* at some future date experience the loss compensation is meant to replace. Unless *Rambo II* is reversed, maritime workers within the Ninth Circuit who experience *neither* current *nor* probable economic loss will be awarded benefits because loss *may*

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[2] Indeed, this Court's recognition of the need for a nationally uniform maritime compensation system forced enactment of the LHWCA. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

at some future date materialize. In no other circuit does a mere *possibility* of future harm trigger current benefit entitlement.

A. The Plain Language Of Section 22 And Its History Document The Legislative Judgment That The Period For Award Modification Should Be Strictly Limited To One Year.

The legislative history underlying Section 22 is well known, reported at length in *Rambo I*, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 463-65 (1968), and *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 8-11 (1975).

Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1437. As originally enacted, time limits on award modification were *very* strict; review was permitted only *during* the term of an award.

Between 1930 and 1933, the United States Employees' Compensation Commission, the agency charged with administering the Act, on four occasions recommended that Section 22's time limitation be extended to permit review at any time. 14th Ann. Rep. of the United States Employees' Compensation Commission ("USECC") 75 (1930); 15th Ann. Rep. USECC 77 (1931); 16th Ann. Rep. USECC 49 (1932); 17th Ann. Rep. USECC 18 (1933). In 1934, Congress rejected the USECC's recommendations that there be an unlimited time period for modification and, instead, chose to impose a one-year time limit. 48 Stat. 807.

In its annual reports for 1934-36, the Compensation Commission recommended that modification rights, originally present only when compensation had been awarded, be extended to cases where the original compensation claim had been rejected. 18th Ann. Rep. USECC 38 (1934); 19th Ann. Rep. USECC 49 (1935); 20th Ann. Rep. USECC 52 (1936). In 1938, Congress accepted this proposal but made the expanded modification remedy subject to the same one-year limitation. 52 Stat. 1167. While enacting this change, Congress once again recorded its judgment that, while the grounds for modification should be broad, the time period should be strictly limited.

> Section 5 of S. 2794 [H.R. 8057] amends Section 22 of the existing Act [by adding 'mistaken in a determination of fact'] so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting' the time period, extends the time within which such modification may be made.

S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934).

In 1938, Congress again revisited the issue. Aware that the one-year time limitation might cause hardship if only the current effects of injury were considered when determining wage-earning capacity, Congress did not choose to "indefinitely extend" the period for modification. Instead, Congress chose to enact Sections 8(h) and (i), 33 U.S.C. Sections 908(h) and (i), to (a) permit consideration of future economic consequences of impairment when initially determining the amount of an award and

(b) avoid frequent award adjustments over long periods of time by authorizing post-award settlements.

> [The proposed amendment adding subdivision (h) to Section 8] also provides for consideration of the effects of an injury, causing permanent partial disability, upon the employee's future ability to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. . . . considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future.
>
> * * *
>
> In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the Act with respect to the filing of the claim for compensation and the right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.

* * *

The suggested addition of subdivision (i) to section 8 is designed to afford the interested parties the opportunity of amicably disposing of cases upon agreed settlements approved by the deputy commissioner, after approval by the Commission, where awards have been made under section 8(c)(21) and section 8(e). Experience shows that in many cases involving disabilities under these provisions (by which compensation is based on loss of earning capacity and is subject to readjustment from time to time over long periods) agreed settlements as approved by the deputy commissioner, with approval of the Commission, would be desirable and in the interest of all parties concerned.

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

Section 22's time limitation was not again considered by Congress until 1983. In that year, it was once again proposed that the one-year time limitation on modification be removed. S. Rep. No. 98-81, 98th Cong., 1st Sess. 73 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 61 (1983). As finally enacted, the law *retained* the existing one-year time limitation on Section 22 modifications.

If there is any ambiguity whatsoever in the plain language of Section 22's one-year time limitation, the history of the LHWCA removes any doubt. Over the past 70 years, Congress has repeatedly considered and reconsidered the wisdom and fairness of the one-year time limitation. *Each* time that the issue has arisen, Congress has reconfirmed its legislative judgment that the time limitation should be retained and strictly applied.

B. When The Plain Language And Statutory History Confirm The Legislative Judgment, That Judgment Must Be Enforced. Only Congress Possesses Authority To Change The Statute.

This Court has *repeatedly* ruled that unambiguous expressions of legislative judgment *must* be enforced in all but the most rare and exceptional cases. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1990); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). *Rambo I* itself emphasized this lesson when it criticized the Ninth Circuit for not even attempting to base its interpretation of "change in conditions" on the language of the statute itself.

> Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'

Rambo I, 115 S.Ct. 2144, 2147. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992):

> Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

The Ninth Circuit overstepped its judicial authority and usurped the legislative role when it indefinitely extended a clear one-year limitation on modification rights because it thought the one-year limitation too strict and the means Congress had chosen to alleviate hardship inadequate.

C. *Rambo II* Again Conflicts With *Fleetwood*. In No Other Circuit Is An Unproven *Possibility* Of Future Loss A Basis For Current Benefit Entitlement.

In *Fleetwood*, the Fourth Circuit rejected precisely the approach adopted in *Rambo II*. Mr. Fleetwood had suggested that because the future effects of his injury were uncertain he should receive "a one-percent permanent partial disability award as a nominal amount to protect him in case his wage-earning capacity changes after one year." The Fourth Circuit rejected that suggestion because the record lacked substantial evidence demonstrating an existing harm of uncertain degree and because Congress's solution for uncertainties regarding the future effects of disability was found within Section 8(h). *See Fleetwood, supra*, at 1235, n.9.

The Ninth Circuit concluded that a nominal award was necessary because it thought there was no other means to protect against future harm.

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination.

Rambo II, 81 F.3d, at 844. The Ninth Circuit either overlooked the fact that Congress had provided just such a

mechanism in Section 8(h) or forgot that courts are not free to substitute their solutions for those selected by Congress.

Rambo II makes no reference whatsoever to the Fourth Circuit's analysis of the "nominal award" issue. Instead, *Rambo II* found its inspiration in *Hole v. Miami Shipyards Corporation*, 640 F.2d 769 (5th Cir. 1981); *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984); and *La Faille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989). To the Ninth Circuit, these cases uniformly stood for the proposition that

> [N]ominal awards may be used to preserve a possible future award where there is a significant physical impairment without a present loss of earnings.

Rambo II, at 843. The Ninth Circuit was mistaken. The cases do *not* uniformly stand for the proposition it identified.

Hole approved the issuance of a nominal award because the Administrative Law Judge determined that Mr. Hole *did* suffer "some degree of economic harm" and because he thought issuance of a nominal award "far less arbitrary than picking a 'disability' figure out of thin air." *Hole*, at 773. In this proceeding, the Administrative Law Judge specifically determined that no current wage-earning capacity loss existed. (App. 31a)

Randall applied the *Hole* approach because there *was*

> [S]ubstantial evidence to support a determination that the claimant has suffered, or will suffer, some injury-related economic harm, but . . . insufficient evidence to allow the ALJ to

> make a reasonable assessment of the precise degree of that harm.

Randall, at 800. In this case, of course, there was no evidence that Rambo continued to suffer or would probably suffer any further injury-related economic harm. Moreover, although the Ninth Circuit thought itself free to make a factual determination that a "significant possibility" of economic harm existed, the District of Columbia Circuit properly left to the Administrative Law Judge "the determination of whether there is sufficient uncertainty concerning the extent, if any, of petitioner's harm to warrant such a *de minimis* award in this case to the ALJ."[3] *Randall*, at 800.

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[3] The Ninth Circuit's willingness to enter its own factual determination regarding the degree of future uncertainties is but another example of its refusal to recognize the limited scope of its authority on review. 33 U.S.C. Section 921(b)(3) limits appellate court review authority to a search for errors of law and adherence to the substantial evidence standard. This Court has repeatedly ruled that reviewing courts lack authority to make factual determinations or substitute their own inferences for those drawn by the statutory factfinder. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947); and *Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935).

Even if the Ninth Circuit's authority on review were broad enough to permit its determination that a significant risk of economic harm existed and, based upon that determination, require entry of a nominal award without remand for further factual findings, the manner in which the Ninth Circuit divined the presence of that risk was itself irrational.

La Faille, the last of the three cases cited by the Ninth Circuit, limited its approval of the nominal award concept to situations in which substantial evidence demonstrates that future economic loss is a "predictable probability." *La Faille*, at 62. *Only* the Ninth Circuit has applied the nominal award concept when only an unproven *possibility* of future harm exists.

The Ninth Circuit's principal basis for perceiving a possibility of future loss was the fact that Mr. Rambo had at one time experienced a permanent partial disability.

> Because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury.

Rambo II, at 845. The future does not always repeat the past. From the evidence presented to him, the Administrative Law Judge concluded that the past economic loss would not recur.

> Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

(ALJ Opinion, App. 31a)

Rambo himself has never alleged that the Administrative Law Judge erred in weighing the evidence. (Board Opinion, App. 25a)

Viewed in the light *most* favorable to Rambo, the most that this record demonstrates is exactly what exists in *all* cases. Future economic loss is *always* possible. If the LHWCA and Section 7(c) of the Administrative Procedures Act, 5 U.S.C. Section 556(d), permitted an award of benefits simply because the *possibility* of future harm was proven or not disproven, formal hearings would be unnecessary. The outcome would be foreordained. This Court, however, has ruled that doubts about the future – speculative or "true" – are not a sufficient basis for awards of LHWCA benefits. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries/Maher Terminals, Inc.*, 114 S.Ct. 2251 (1994).

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

DATED: August 16, 1996.

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	)	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed May 22, 1996)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, *Claimant-Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, *Respondents.*	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 OPINION

On Remand from the United States Supreme Court

Filed April 10, 1996

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Leavy;
Partial Concurrence and Partial Dissent by Judge Reinhardt

* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

SUMMARY

Labor and Employment/Workers' Compensation/ Admiralty and Marine

On remand from the United States Supreme Court, the court of appeals denied a motion to dismiss, reversed an order of the Benefits Review Board (BRB), and remanded. The court held that a remand was warranted for entry of a nominal award of worker's compensation pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), where an award modification had been requested in regard to a claimant who suffered a permanent partial disability.

Petitioner John Rambo was injured while working as a longshore frontman for respondent Metropolitan Stevedore Co. Rambo filed a claim with the Department of Labor. An administrative law judge (ALJ) awarded him $80.16 per week in worker's compensation for a permanent partial disability pursuant to the LHWCA.

Metropolitan requested an award modification to terminate Rambo's benefits. His physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300 percent of his pre-injury average weekly wage. Section 22 of the LHWCA allows for modification of a disability award due to "a change in conditions." Rambo opposed the requested modification, arguing that he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions." The ALJ ruled that Rambo's award of benefits did not constitute a settlement and

could properly be modified. The ALJ also ruled that Rambo's new job was a "change in conditions" supporting modification. The ALJ terminated Rambo's benefits, and the BRB affirmed.

The court of appeals reversed the BRB in the belief that the "change in conditions" requirement required proof that Rambo had undergone a change in physical condition. The Supreme Court reversed, holding that a disability award may be modified under § 22 where there is a change in wage-earning capacity, even absent a change in the employee's physical condition. The Court remanded, noting that Rambo raised other arguments not addressed by the court of appeals. Metropolitan moved to dismiss Rambo's appeal for failure to raise issues before the ALJ and BRB.

[1] The ALJ and the BRB treated arguments by Rambo as assertions that there had been a "settlement." [2] Estoppel did not bar Metropolitan from seeking an award modification.

[3] A weekly de minimus award, in effect, extends a claimant's right to modification indefinitely. [4] Sections of the LHWCA require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. [5] A nominal award is the only mechanism available to incorporate the possible future effects of a disability in an award determination. A nominal award is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has been given an award based on a finding of permanent partial disability. [6] In ruling that Rambo no longer had a wage-earning capacity loss and terminating

his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of his permanent partial disability on future earnings. The ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence. The BRB erred in affirming the ALJ's order. [7] Because Rambo suffered a permanent partial disability, there was a significant possibility that he would at a future time suffer economic harm as a result of the injury. The appropriate award modification was a small award.

Circuit Judge Reinhardt concurred in part and dissented in part, stating that the issue of whether Rambo's employer was estopped from seeking modification of the $80.16 per week compensation award could not be decided on the record.

OPINION

LEAVY, Circuit Judge:

INTRODUCTION

This appeal is before us on remand from the Supreme Court for our consideration of issues raised originally on appeal but not discussed in our earlier decision. *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86 (9th Cir.), *rev'd and remanded sub nom., Metropolitan Stevedore Co. v. Rambo*, 115 S.Ct. 2144 (1995). We now reverse the Benefits Review Board's order affirming the termination of Rambo's benefits and remand for entry of a nominal award.

FACTS AND PRIOR PROCEEDINGS

In 1980, appellant John Rambo (Rambo) injured his back and leg while working as a longshore frontman for Metropolitan Stevedore Company (Metropolitan). Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge (ALJ). In 1983 the ALJ awarded Rambo $80.16 per week in worker's compensation for a permanent partial disability, pursuant to § 8(c)(21) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(21) (1986) (LHWCA). Section 22 of the LHWCA allows for modification of a disability award "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. § 922. In 1990, Metropolitan requested an award modification to terminate Rambo's benefits. Rambo's physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300% of his pre-injury average weekly wage. In opposing the requested modification, Rambo argued that his award could not be modified because he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions" within the meaning of 33 U.S.C. § 922. The ALJ ruled that Rambo's award of benefits did not constitute a settlement and, therefore, could properly be modified and that Rambo's new job was a "change in conditions" that supported modification. The ALJ then terminated Rambo's benefits. The Benefits Review Board (BRB) affirmed.

We reversed the BRB in the belief that the "change in conditions" requirement for an award modification under § 922 required proof that Rambo had undergone a change

in his physical condition. *Rambo*, 28 F.3d at 87. The Supreme Court reversed, holding "that a disability award may be modified under § 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition." *Metropolitan Stevedore Co.*, 115 S.Ct. at 2150. The Supreme Court remanded the case "[b]ecause Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address." *Id.*

The two issues raised by Rambo and not decided in our earlier ruling are:

> (1) Should the employer be estopped from filing a 33 U.S.C. § 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

Petitioner's Opening Brief at 7 & 9. Metropolitan moves to dismiss Rambo's appeal on the ground that these issues were not raised before the ALJ or BRB.

ANALYSIS

Standards of Review

The BRB must accept the ALJ's factual findings if they are supported by substantial evidence. 33 U.S.C. § 921(b)(3). BRB decisions are reviewed by the appellate courts for "errors of law and adherence to the substantial evidence standard." *Metropolitan Stevedore Co. v. Brickner*,

11 F.3d 887, 889 (9th Cir.1993) (internal quotations omitted). Because the Board is not a policy-making agency, its interpretation of the LHWCA is not entitled to any special deference from the courts. We have noted, however, that we will "respect the Board's interpretation of the statute 'where that interpretation is reasonable and reflects the policy underlying the statute.' " *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1580 (9th Cir.1985) (citations omitted) (quoting *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 880 (9th Cir.1979)).

Discussion

Metropolitan moves to dismiss Rambo's appeal for failure to raise the issues before the ALJ and BRB. Issues not raised before these bodies will not be heard on appeal. *Goldsmith v. Director, Office of Workers' Compensation Programs*, 838 F.2d 1079, 1081 (9th Cir.1988); *Long*, 767 F.2d at 1583.

> There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir.1989) (citations omitted).

1. *Estoppel.*

Rambo argued to the ALJ that Metropolitan's Application for Modification under § 922 "should be dismissed because the parties settled this claim in 1983. . . . The employer agreed to pay $80.16 per week 'indefinitely.' "

On appeal to the BRB Rambo argued that there was a "settlement" between the parties and that Metropolitan was "estopped" from withdrawing from the settlement.

[1] Both the ALJ and BRB treated Rambo's arguments as assertions that the 1983 Order constituted a settlement under 33 U.S.C. § 908(i)(1). They found that the Order was not a statutory settlement and, consequently, Metropolitan could seek modification under § 922. Neither the ALJ nor the BRB ruled on the estoppel issue. That they did not rule on it is not controlling, however, if the issue was sufficiently raised below for the ALJ and BRB to rule on it. *Smiley v. Director*, 984 F.2d 278, 281 (9th Cir.1993). The ALJ and the BRB could have ruled on the estoppel issue. Thus, Rambo can raise the estoppel argument on appeal.

Application of the estoppel doctrine requires four elements: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Ellenburg v. Brockway*, 763 F.2d 1091, 1096 (9th Cir.1985) (citing *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir.1981); 1 S. Williston, Williston on Contracts § 139 (3d ed. 1957)). Rambo testified before the ALJ that, on the day of his 1983 hearing, he met with his attorney and Metropolitan's attorney and they both told him that he was going to receive $80.16 per week for life. Rambo didn't recall whether his attorney told him the award could be modified. $80.16 is what Rambo was entitled to under the LHWCA for a 22½% permanent partial disability based on an average pre-injury weekly

wage of $534.38. 33 U.S.C. § 908(c)(23) (compensation equals 66²/₃% of average weekly wages multiplied by the percentage of permanent impairment). The parties stipulated to the injury, the degree of disability, the compensation rate, and to an award of $80.16 per week "subject to . . . all other provisions of the [LHWCA]."

[2] Rambo received no less an award than he was entitled to under the statute. Both the ALJ and BRB determined that the 1983 "Decision and Order – Awarding Benefits" was not a settlement of Rambo's claim against Metropolitan, but an award of benefits based on the parties' stipulations and subject to modification under § 922. Thus, at least one of the elements necessary for application of estoppel is missing: reliance on Metropolitan to Rambo's detriment. Estoppel does not bar Metropolitan from seeking an award modification.

2. *Nominal Award.*

Even though Rambo did not specifically mention a nominal award before the ALJ or BRB we can consider the propriety of a nominal award on appeal. "A claim for total disability benefits includes any lesser degree of disability." *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n. 2 (1985). By contesting downward modification of his award, Rambo was asserting his right to an award of any size.

Rambo argues that the BRB should have modified his award to a nominal amount "in the interest of justice," rather than terminating it entirely. We have not determined the propriety of a nominal award to preserve the

right to future benefits in either an initial award determination or, as here, in a modification proceeding. *See Todd Shipyards v. Office of Workers' Compensation*, 792 F.2d 1489, 1491 (9th Cir.1986). The Second, Fifth, and District of Columbia Circuits have ruled that nominal awards may be used to preserve a possible future award where there is a significant physical impairment without a present loss of earnings. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 62 (2nd Cir.1989); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir.1981); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C.Cir.1984).

[3] The BRB, however, "has repeatedly expressed its dissatisfaction with de minimis awards of benefits, viewing them as judicially created infringements upon the province of the legislature because they indefinitely extend the time period provided for modification by Section 22." *Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988) (citations omitted). Under § 922, a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus award, in effect, extends a claimant's right to modification indefinitely.

Section 8(h), 33 U.S.C. § 908(h), sets forth how wage-earning capacity in cases of partial disability is determined:

> (h) The wage-earning capacity of an injured employee in cases of partial disability

under subsection (c)(21) of this section [permanent partial disability] . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.*

33 U.S.C. § 908(h) (emphasis added).

[4] This section "allows the [ALJ] to consider the future effects of a disability." *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir.1982), *cert. denied*, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed.2d 600, *citing Hole*, 640 F.2d at 772; *Lumber Mut. Casualty Ins. Co. v. O'Keefe*, 217 F.2d 720, 723 (2d Cir.1954); *Hughes v. Litton Systems, Inc.*, 6 BRBS 301 (1977).

> The disability award provided for under the Act is designed to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime. The Benefits Review Board and the courts have mandated this "forward-looking perspective" precisely because of the short statute of limitations.

Randall, 725 F.2d at 795 (citations omitted). Both § 908 and § 922 require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. *Hole*, 640 F.2d at 772 (citations omitted).

[5] While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has already been given an award based on a finding of permanent partial disability.

Here the evidence is uncontroverted that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. This wage-earning capacity loss was sufficient to support a weekly benefits award. Rambo's physical condition remains unchanged. The evidence was also that Rambo, at the present time, was employed as a crane operator and was earning more than he had before his injury. Rambo also testified that he didn't know how long his job as a crane operator would last.

[6] In ruling that Rambo no longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings. Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence and the BRB erred in affirming the ALJ's order.

[7] Because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury. The LHWCA mandates a forward look in award determinations. Thus, the appropriate award modification is a small award "fashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him." *Hole*, 640 F.2d at 773.

CONCLUSION

Metropolitan's motion to dismiss is DENIED. The BRB's order affirming the termination of Rambo's benefits is REVERSED and REMANDED for entry of a nominal award.

REINHARDT, Circuit Judge, concurring in part, dissenting in part:

I dissent because the issue whether Rambo's employer is estopped from seeking modification of his $80.16 per week compensation award cannot be decided on the record before us.

Rambo argues that Metropolitan is estopped from seeking modification pursuant to 33 U.S.C. § 922 because its attorney-representative told Rambo before he agreed to numerous stipulations that the stipulated award of $80.16 would be paid to him "for life." The majority somehow concludes either that (1) Rambo did not rely on the statements of Metropolitan's attorney or (2) he did not rely on them to his detriment. I do not think the

record is sufficiently developed to permit us to reach either conclusion.

If Rambo relied on a promise by Metropolitan of an agreed-upon payment of $80.16 per week for the rest of his life and if he could have established a greater percentage of disability had he proceeded to trial as opposed to stipulating to a 22½% disability, there would be no question that he relied on Metropolitan's representation to his detriment. Unfortunately, the record before us sheds little, if any, light on the crucial issues: whether Metropolitan's counsel promised Rambo that he would receive an award that would provide a weekly payment in a fixed amount "for life;" whether, if such promise was made by Metropolitan's counsel, Rambo relied on it; and, finally, whether Rambo could have established a greater percentage disability if he had proceeded to trial.

According to Rambo, his employer's attorney did indeed promise him $80.16 per week for the rest of his life. Rambo argues that he agreed to a disability of "22½%" following the conversation during which the promise was made to him. Before us, as he did below, Rambo contends that he was induced to limit his claim to 22½% disability and not to proceed to trial by his employer's promise of a set payment for life.

The fact that the ALJ's Statement of Stipulations contained a boilerplate parenthetical phrase – "subject to . . . all other provisions of the Act" – that can be construed to subject Rambo's award to § 922 modification is by no means dispositive of whether Rambo relied on the statements of his employer's representative to his detriment. Whether Rambo was led to believe that his

agreement with Metropolitan would provide indefinite or permanent relief notwithstanding the inclusion of that parenthetical phrase in the stipulation is a factual question that should be remanded to the Benefits Review Board. I would remand the matter for further factual development that would enable the Board to resolve the estoppel issue properly.

Given the majority's disposition of the estoppel issue, however, I would agree with my colleagues that the Board erred in terminating Rambo's benefits rather than modifying them so as to provide for a nominal award. Thus, while I dissent from Section 1 of the majority opinion, I concur in Section 2.

APPENDIX 3

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

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*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon *"a change in physical condition,"* but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick,*] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

APPENDIX 4

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION AND ORDER (Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.,* 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.,* 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores,* 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority,* 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

APPENDIX 5

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of	)	
JOHN RAMBO	)	Case No.
Claimant	)	83-LHC-242
against	)	OWCP No.
METROPOLITAN STEVEDORE COMPANY,	)	18-6945
Self-Administered Employer	)	

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.
2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.,* 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll

(2)

No. 96-272

In The

Supreme Court of the United States

October Term, 1995

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

1. After an initial determination that a Claimant has suffered a serious medical disability which produced economic harm, does *33 U.S.C.* 908(h) permit a nominal award for the purpose of preserving a Claimant's right to receive compensation into the future?

2. Is the decision of the Court of Appeals in conflict with a decision of another United States Court of Appeals?

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I. STATUTORY PROVISION INVOLVED

33 *U.S.C.* Section 908(h)

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

II. STATEMENT OF THE CASE

The Respondent, John Rambo, ("Rambo") a longshoreman, injured his back and leg within the course and scope of his employment on September 9, 1980, while employed by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Rambo filed a claim with the United States Department of Labor and trial was set before an Administrative Law Judge ("ALJ") in 1983. At the trial the parties stipulated among other things:

> "That the employee sustained an over-all current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $102.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability."

On November 28, 1983 the ALJ issued a Decision and Order awarding benefits to Rambo at the rate of $80.16 per week for permanent partial disability.

On October 30, 1989, Metropolitan filed with the Department of Labor an "Employer's Application For Modification, Section 922."

A Formal Hearing on the Modification was convened on October 15, 1990 by the ALJ.

At the outset of the proceeding Claimant moved to dismiss on the grounds that the Petition was unsupported by evidence of a change in Rambo's physical condition. In reliance on existing case law and this Motion, Rambo presented no evidence. In support of its Petition Metropolitan offered only Rambo's post injury earnings. Metropolitan called Rambo as the only witness.

Rambo's testimony was uncontroverted that his physical condition had not changed since the Stipulated Award issued in 1983; and, that his permanent partial disability reduced his ability to perform his pre-injury work. Rambo also testified that he was presently employed as a longshore crane operator, was earning more than he had before his injury and that he did not know how long the crane job would last.

The ALJ ruled that Rambo's new job was a "change in conditions" that supported modification and terminated Rambo's benefits. The Benefits Review Board ("BRB") affirmed. Rambo appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals reversed the BRB in the belief that the "change in conditions" requirement for an award modification under Section 922 required proof that Rambo had undergone a change in his physical condition.

The Supreme Court reversed, holding "that a disability award may be modified under Section 22 . . . without any change in the employee's physical condition." *Metropolitan Stevedore Co.*, 115 S. Ct. at 2150. The Supreme Court remanded the case "(b)ecause Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address." Id. Emphasis added.

The two issues raised by Rambo and not decided were:

> (1) Should the employer be estopped from filing a 33 U.S.C. Section 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order of Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

III. THE NINTH CIRCUIT COURT OF APPEALS DECISION

A. THE FIRST ISSUE REMANDED – ESTOPPEL

In a split decision, the Court held that Metropolitan could seek modification of the prior award of permanent partial disability benefits because, " . . . reliance on Metropolitan to Rambo's detriment" was not established by the record.

B. THE SECOND ISSUE REMANDED – NOMINAL AWARD

In a unanimous decision the Court of Appeals stated that the propriety of a nominal award was properly before it on appeal. The Court cited *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985).

The Court next addressed the propriety of a nominal award in a modification proceeding and stated that the issue had not been determined by the Ninth Circuit. The Court stated, "The Second, Fifth and District of Columbia Circuits have ruled that nominal awards may be used to preserve a possible future award where there is a significant physical impairment without present loss of earnings." *Rambo v. Metropolitan* Petitioner's Appendix 1, Pg. 11A.[1]

The Court reviewed *33 U.S.C.* 922 and noted that it provides that compensation cases may be reviewed and a new compensation order issued which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or the rejection of the claim.

In reviewing *33 U.S.C.* Section 908(h), the Court emphasized the statutory language that, " . . . The deputy Commissioner **may**, in the **interest of justice, fix** such **wage earning capacity as shall be reasonable**, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which **may** affect his capacity to earn wages in his disabled condition, **including the effect of disability as it may naturally extend into the future**."

The Court noted that, "This section (908(h)) 'allows the (ALJ) to consider the future effect of a disability' citing *Todd Shipyards v. Allan*, 66 F.2d 399 (9th Cir. 1982),

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[1] In *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), the District of Columbia Court of Appeals exhaustively analyzed the interrelationship between Section 922 and Section 908(h), and authorized a nominal award.

In *LaFaille v. B.R.B.*, 864 F.2d 54 (2nd Cir. 1989) the Director, OWCP, argued to the Court that Section 908(h) permitted de minimus awards and the court agreed.

In *Hole v. Miami Shipyards*, 640 F.2d 769 (5th Cir. 1981), the Court reviewed both Section 922 and Section 908(h) and held that the statutory scheme permitted de minimus awards.

cert denied, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed 2d 600, Citing *Hole v. Miami Shipyards Corp.*, 640 F.2d at 772." (Petitioner's Appendix 1 Pg. 12A)

After reviewing the evidence the Court HELD that:

> "Looking at the evidence as a whole, the ALJ's Decision to terminate Rambo's benefits is NOT *supported by substantial evidence* and the BRB erred in affirming the ALJ's Order". (Petitioner's Appendix 1, Pg. 13a; Emphasis added).

Finally, the Ninth Circuit Court of Appeals:

1. Concluded quoting the ALJ in *Hole v. Miami Shipyards Corp.*, 640 F.2d at 773 (5th Cir. 1981), that, " . . . a small award fashioned expressly for the purpose of preserving (Rambo's) right to receive compensation should disability in an economic sense ever visit him." was appropriate in this case; and,

2. Remanded for entry of a nominal award.

IV. SUMMARY OF ARGUMENT

By ignoring the statutory framework and pertinent legislative history of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), the Petition presents an incomplete and inaccurate picture of **both** the intent of Congress and the propriety of the decision of the Ninth Circuit Court of Appeals. The LHWCA is a comprehensive scheme to provide compensation for disability (or death) of a covered employee, including the effect of disability as it may naturally extend into the future and through the employee's lifetime.

The legislative history of the LHWCA clearly shows that as early as 1938 when Congress amended the Act and added Section 908(h), Congress intended a "forward looking" perspective in the consideration of an employee's disability and Congress was concerned that the beneficent purpose of the Act might be defeated by the one year limitations period for modification if the future effects of disability were not taken into account. In the years that followed, the Courts were left to determine the best method to take account of unknown future effects of disability. Where an employee clearly has sustained a serious medical disability which may cause economic harm in the future, but has no current loss of earnings, the Courts have **uniformly** arrived at the solution of granting a small or nominal, running award to further the beneficent purposes of the Act and Congress' mandate that due concern be given to the effect of disability as it **may** naturally extend into the future.

In proposed Amendments to the LHWCA in 1983 and 1984, the Congressional Committee on Labor and Human Resources recommended eliminating **both** the one year limitations period for modification contained in Section 922 and the "forward looking" language of Section 908(h). The language of the Committee's report clearly makes reference to the nominal, running awards developed by the Courts in cases where workers suffered a major industrial injury which could cause future economic harm and where rejection of the claim would have required a request for modification within a year pursuant to Section 922, whether or not such a new claim

was justified. Congress **rejected** the proposed amendments and reenacted Section 908(h) intact, fully aware of the "solution" developed by the Courts.

In addition to this clear demonstration of Congressional intent, the Director, OWCP (the Administering Agency for the LHWCA) has also advocated the use of nominal, running awards. Based upon the statutory scheme, the legislative history and beneficent purpose of the Act, this position is a reasonable construction entitled to deference.

Finally, there is no conflict in any Circuit Court of Appeals regarding the use of nominal, running awards in the appropriate case. Petitioner misstates the decision in *Fleetwood v. Newport News*, 776 F.2d 1225 (4th Cir. 1985) in an attempt to create a conflict with the case at bar. In fact, the *Fleetwood* Court simply reviewed the evidence and found that the employee no longer had a loss of wage-earning capacity and, thus, that a nominal, running award was not appropriate on the particular facts of that case. The Ninth Circuit Court of Appeals herein made exactly the same type of review of the evidence as the Fourth Circuit did in *Fleetwood*. Based upon the factual record in *Rambo*, including the stipulation of the parties as to a 22 1/2% permanent partial disability sustained by Rambo and uncontradicted evidence that Rambo's physical condition had not changed, the Ninth Circuit simply reached a different decision regarding Rambo's entitlement to a nominal, running award. Contrary to the assertions of the Petitioner the decision of the Ninth Circuit herein does **not** overstep the Court's judicial authority or usurp the legislative role. Therefore, the Petition For Writ of Certiorari should be denied.

V. ARGUMENT

A. STATUTORY FRAMEWORK

"The LHWCA is a comprehensive scheme to provide compensation in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon navigable waters of the United States . . . LHWCA *33 U.S.C.* Sec. 903A." *Metropolitan Stevedore Company v. Rambo (Rambo I)*, 115 S.Ct. 2144, 2145 (1995).

"Disability under the LHWCA, . . . may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they fairly and reasonably represent his wage-earning capacity and if they do not, then with due regard to the nature of the employee's injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may effect his capacity to earn wages in his disabled condition including THE EFFECT OF DISABILITY AS IT MAY NATURALLY EXTEND INTO THE FUTURE." Id. at Pg. 2146. (Emphasis added).

" . . . the Act is designed to compensate for any injury related reduction in wage-earning capacity through the Claimant's lifetime". *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984).

The "forward looking" perspective of Section 908(h) which allows for the consideration of the future effects of disability must be read in **conjunction** with the relatively short statute of limitations to understand the **statutory scheme**. *Randall*, 725 F.2d at Pg. 795. (Emphasis added)

The Act contains the provision which grants discretion to set wage-earning capacity in the **interest of justice** because Congress realized the potentially harsh effect of the relatively short statute of limitations in a case where Claimant's post injury earnings are equal or greater than his earnings prior to his injury. *Randall*, 725 F.2d at Pg. 795; *Hole*, 640 F.2d at Pg. 772.

"When it is clear that a claimant has suffered a medical disability and there is a significant possibility that the Claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable, the **beneficent purposes** of the Act and the **mandate** that due concern be given to the effect of disability as it may naturally extend into the future are furthered by granting . . . " a nominal award. *Randall*, 725 F.2d at Pg. 800.

B. LEGISLATIVE HISTORY

As originally enacted the Act did not contain a Section 908(h). In 1938 Congress Amended the Act and added Section 908(h) in essentially the same language as it exists today.

The Committee of the Whole of the House of Representatives in Report No. 1945 as incorporated verbatim in the Senate Committee on the Judiciary Report No. 1988 at Pg. 5 reported on the Congressional intent of Section 908(h). In unmistakably colorful language Congress specifically coupled Section 908(h) with the limitations period of Section 922. It specifically authorized the fixing of awards to run into the future for the purpose of avoiding the limitation period of Section 922. So that

there can be no doubt on these points as to the Congressional intent, the following is a verbatim statement of the Congressional Report.

> "The proposed amendment adding subdivision (h) to section 8 is to clarify the interpretation to be placed upon the words "wage-earning capacity" used in the act in connection with partial-disability cases. The absence of clarity in the Longshoremen's Act in this respect has been productive of wasteful litigation which has not resulted in settling the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury. A provision to accomplish the same general purpose was added to the New York workmen's compensation law in 1930, which will be found as subdivision 5-a of section 15 of the New York act. The proposed amendment is constructed partly after the New York provision, with an addition thereto incorporating, for clearness and for assistance to the deputy commissioners and others, a general reference to the factors to be considered in determining an employee's wage-earning capacity.
>
> It also provides for consideration of the effects of an injury causing permanent partial disability, upon the employee's **future ability** to earn. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and

with his opportunity to secure gainful employment definitely limited. For instance, an employee may have an industrial hernia, retainable by a truss but not operable; but his old employer might be willing to continue him on in employment at the rate of pay at time of injury notwithstanding his impaired condition, particularly where the job does not require able-bodied labor. It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the **future consequences of such disability on the employee's capacity to earn as it naturally extends into the future**. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and **probable impairment** of future wage-earning capacity an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the **limitations in the act** with respect to the filing of claim for compensation and **right of review** of the case **(Sec. 22)** had run, after which time the employee's right to compensation would be **barred** and the

employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the **beneficent provisions of the Longshoremen's Act**. Court decisions recognizing factors other than actual wages paid after injury are *Dragons* case (161 N.E. 816, Mass); *Roller v. Warren* (129 Atl. 158, Vt.); *Postal Telegraph Cable Company v. Industrial Accident Commission of California* (3 Pac. 2d 6); *Hartford Accident & Indemnity Company v. Hoage* (85 Fed. (2d) 42) 420." (Emphasis added).

S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

Each case cited in the Congressional record involved an injured worker who earned the same wages after the accident. In each case the Court held that the employee was entitled to an award to compensate him for his loss of wage-earning capacity. The loss of wage-earning capacity was measured by comparing the employee's pre-injury actual wages without physical impairment and the employee's ability to earn wages post injury with physical limitations caused by the injury.

In proposed Amendments in 1983 and 1984, Congress again coupled Section 908(h) and Section 922. These Amendments proposed that Section 922 be amended to eliminate the one year limitations period concomitantly eliminating from Section 908(h) the phrase "as it may naturally extend into the future." The resulting statutory framework would have eliminated a need for continuing awards running into the future because the one year limitations period would be eliminated. The Committee on Labor and Human Resources in Report No. 98-81 (May 10, 1983) at Pg. 37 stated:

"MODIFICATIONS

Consistent with the change made in Section 8(h) on the issue of wage earning capacity, the one year time limit for modification of awards has been eliminated . . . This Amendment promotes equity by permitting all parties to apply for modification of awards at any time after an award is entered. The one year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by the Act. As a consequence, Administrative Law Judges felt compelled to award benefits for wage loss at the rate of **one percent** in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The **NEW APPROACH** is far more realistic, allowing claimants for example, to apply for increased benefit for wage loss or for greater physical disability at a time when full effects of an injury may manifest themselves. Requests for modification will no longer be necessary simply to keep the statute of limitation from running." (Emphasis added).

C. CONGRESSIONAL INTENT

In a statutory construction case, the beginning point must be the language of the statute and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589 (1992).

Section 908(h) clearly states that the Court **may** fix wage-earning capacity as shall be reasonable including

the effect of disability as it may naturally **EXTEND** into the **FUTURE**. The normal meaning of the language of the Statute clearly permits awards of any amount for loss of wage-earning capacity to extend into the future.

"We have often relied on Congress's reenactment of statutory language that has been given a consistent judicial construction in particular where Congress was aware of or made reference to that judicial construction". Rambo I at Pg. 2144.

In the proposed amendments in 1983 and 1984 the Legislative history of Section 908(h) and Section 922 clearly referred to *Hole v. Miami* (supra) with reference to a **one percent award**. Congress rejected the amendments and reenacted Section 908(h) intact.

Therefore, the Congressional intent so clearly and colorfully stated in 1938 and reenacted without change after a reference to *Hole* makes it clear Congress mandated that Courts **may**, where appropriate, under the circumstances of each case, in the **interest of justice**, fix wage-earning capacity into the **future** in any amount so that an employee will not be barred from presenting a claim because of the limitation period contained in Section 922.

The language of Section 908(h) is clear. The Legislative history of Section 908(h) is clear in both 1938 and 1984. Congress intended to allow awards in any amount to extend into the future and the Court of Appeals did exactly that in this case.

D. DEFERENCE

"If the Court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based upon a permissible construction of the statutes." *Chevron U.S.A., Inc., v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Director, OWCP, through a delegation of powers from the Secretary of Labor is the Administrating Agency for the LHWCA.

The Director in *LaFaille v. B.R.B.*, 884 F.2d at Pg. 62, argued for a de minimus award. The Agency's position was based upon the statutory scheme, legislative history and the beneficent purpose of the Act. Such an interpretation is a reasonable construction and is therefore entitled to deference.

Under either the plain meaning of the language of Section 908(h); or, the deference due the Director, the issue of the propriety of nominal awards running into the future was authorized and intended by Congress.

E. NO CONFLICT BETWEEN CIRCUITS

There is absolutely no split in the Circuits on the issue of de minimus awards. Petitioner asserts that the decision in the case at bar is in conflict with the decision in *Fleetwood v. Newport News*, 776 F.2d 1225 (4th Cir. 1985).

This statement is erroneous. The *Fleetwood* majority at 776 F.2d, Pg. 1234 cites in its footnotes the decision of the D.C. Circuit in *Randall* (supra) and the 5th Circuit in *Hole* (supra) **without criticism**. The *Fleetwood* majority examined the factual record to determine if there was substantial evidence to support the finding that the Claimant suffered a loss of wage earning capacity. The *Fleetwood* Court concluded that, "Our review of this evidence leads us to conclude that *Fleetwood* . . . no longer has a wage-earning capacity loss. . . . " The Court's factual finding foreclosed a decision on a de minimus award. This issue was not addressed by the *Fleetwood* court.

VI. CONCLUSION

In the case at bar, the Ninth Circuit Court of Appeals reviewed the factual record. That record contained the parties **stipulation** that Rambo, " . . . sustained an over all permanent partial disability of 22 1/2% of the whole person which the parties recognize as an '**ECONOMIC DISABILITY**' " (emphasis added).

The Ninth Circuit Court of Appeals also noted that it was uncontested that Rambo's physical condition had not changed since 1983 and that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. Based upon this review, the Court concluded that, "This wage earning capacity loss was sufficient to support a weekly benefit award." The Court stated, "Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence". The Court ordered the case remanded for entry of a nominal award.

Petitioner asserts that the decision of the Court of Appeals willfully ignored the plain language of Section 922 which permits modification only within one year of the last payment of compensation or rejection of the claim. Petitioner argues that by entering a running, nominal award the Court of Appeals intentionally attempted to overrule the intent of Congress expressed in the one year limitation of Section 922. Petitioner carefully points out that there have been numerous attempts to eliminate the one year limitation period of Section 922 – all of which have failed.

What Petitioner fails to point out to this Honorable Court is that, as far back as 1938, Congress linked the provisions of Section 922 with those contained in Section 908(h). This coupling of Section 922 and Section 908(h) continued through the last amendment of the LHWCA in 1984. Nothing could be clearer than the 1984 Report from the Committee on Labor and Human Resources which recommended a "New Approach" by eliminating *both* the one year limitation of Section 922 and the Section 908(h) phrase " . . . as it may naturally extend into the future." Petitioner has presented only half of the picture.

In fact, the legislative framework since Section 908(h) was enacted in 1938 contemplates running awards when there has been a loss of wage-earning capacity whether it be one percent, five percent, ten percent, 22 1/2 percent, a de minimus award or a nominal award. The Act states that the Court **may** enter this type of award.

In Section 908(h) Congress allows the Courts to consider " . . . any other factors or circumstances in the case

which **MAY** affect his capacity to earn wages in his disabled condition, including the effect of disability as it **MAY** naturally extend into the future." (Emphasis added). By using the term "**MAY**", Congress clearly authorized Courts to award whatever benefits it deems appropriate if, in the Court's opinion, loss **MAY** at some future date materialize. This is the plain meaning of Section 908(h). It is a distinction without a difference to argue as the Petition does that the Court must couch such an award upon the future possibility, probability or inevitability of future economic harm. Only one being knows the future. Recognizing that, Congress set forth in Section 908(h) factors to be considered in assessing whether or not there was a loss of wage-earning capacity including "the effect of disability as it may naturally extend into the future." After considering these factors, if the Court finds a loss of wage-earning capacity it **may** enter that award to run into the future subject to further modification.

In fact every Court of Appeals that addressed the issue of nominal running awards under Section 908(h) has approved them. Every Court of Appeals approved such awards on the basis that Congress clearly authorized them in Section 908(h).

Therefore, this Petition does not present to this Court the refusal of a Court of Appeals to follow the intent of Congress. It does not present the issue of a Court of Appeals that refused to follow this Court's directive to enforce the plainly expressed intent of Congress. It does not present to this Court the issue of the Circuits interpreting an Act of Congress differently. Contrary to the assertions of Petitioner, the Court of Appeals in this case

did not overstep its judicial authority or usurp the legislative role. It simply followed the clear intent of Congress to allow consideration of, among other factors, the future effects of a proven disability through the use of a running, nominal award. This Petition does not present any other issues.

Consequently, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Rambo acknowledges that Section 22's one-year limitation is clear and that it has survived numerous attempts at legislative change. He does not challenge the fact that the Ninth Circuit *did* "indefinitely extend" that limitation period because it wished to forever preserve to Rambo the opportunity to receive compensation if he at some future time suffered economic harm. Unable to dispute the what, why, or effects of the Ninth Circuit's action, Rambo offers three defenses to what would otherwise be a transparent trespass upon Congress's role. Not one withstands scrutiny.

The first of Rambo's arguments is that Section 8(h) of the LHWCA, 33 U.S.C. Section 908(h)

> [C]learly authorize[s] Courts to award whatever benefits it [sic] deems appropriate if, in the Court's opinion, loss MAY at some future date materialize.

(Brief in Opposition, p. 19) The language upon which Respondent Rambo focuses appears in the final portion of Section 8(h), in the *proviso* authorizing consideration of "the effect of disability as it may naturally extend into the future" when determining the wage-earning capacity of a disabled worker. Rambo, however, fails to mention that Section 8(h) authorizes consideration of those future effects only *after* it is determined that the worker's actual earnings do *not* "fairly and reasonably represent his

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In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

wage-earning capacity," i.e., only *after* there is found to be some degree of existing "disability."

The "plain language" of Section 8(h) trumpeted by Respondent Rambo requires the proven presence of *some* economic harm before the extent or degree of that harm may be assessed by reference to a broad variety of factors, including the inherently speculative future. Liability must exist before damages can be assessed. In this case, the Administrative Law Judge charged with hearing and evaluating the evidence determined that the liability arising out of Rambo's earlier wage-earning capacity loss had ended.

Rambo's second argument is that Congress's decision in 1984 to *retain* both the existing one-year limitation in Section 22 and the final clause of Section 8(h) is an implicit endorsement of the "nominal award" concept.[1]

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[1] Rambo attempts to shoehorn the comments accompanying the proposed amendments in 1983 into the principle that reenactment of language which has received consistent judicial construction is strongly suggestive of Congress's intent. The effort is forced. Although the Fifth Circuit's opinion in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), was issued before the Committee comments were written and *may* have been the subject when the Committee referred to the problem caused by "Administrative Law Judges [who] felt compelled to award benefits at the rate of one percent," the two other circuits which have approved nominal awards in some factual circumstances did not express their views until 1984 and 1989. Rambo also neglects to mention that the Benefits Review Board itself has consistently *rejected* the practice. *See Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988). There simply was *no* "consistent judicial construction" to be endorsed by the amendments' rejection.

According to Rambo, Section 8(h) should trump Section 22 whenever an Administrative Law Judge, the Benefits Review Board, or a Court of Appeals believes the one-year limitation unreasonably short.

The fact that the legislative history offers no clue about the Conference Committee's reasons for rejecting the proposed amendments and the clear possibility that Congress may have thought the proposed cure more damaging than the disease are ignored by Rambo. Instead, he argues that he should receive precisely what Congress refused to provide in 1984 – an unlimited modification period. In fact, Respondent Rambo seeks – and the Ninth Circuit provided – *more* than Congress's acceptance of the rejected proposals would have afforded – *both* a current award *and* an unlimited modification period.

The third of Rambo's arguments – the one that blinds him to the differences among the nominal award analyses of the Second, Fifth, Ninth, and District of Columbia Circuits – is that it is a "distinction without a difference" to argue – as Metropolitan does – that a mere possibility of future economic harm is an insufficient basis for any award, nominal or substantial.[2] According to Rambo,

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[2] The Fifth Circuit approved a nominal award when the Administrative Law Judge determined that "some degree of economic harm" existed. The District of Columbia Circuit followed suit when the evidence demonstrated that the claimant "suffered, or will suffer" economic harm. The Second Circuit limited its approval to cases in which evidence proved future loss to be a "predictable probability." *Hole, supra*, at 773. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *La Faille v. Benefits Review Board*, 884 F.2d 54, 62 (2d Cir. 1989). The

"Only one being knows the future." (Brief in Opposition, p. 19)

Doubts which remain for all but the deities may not sustain an award of LHWCA benefits. *See Director, OWCP v. Greenwich Collieries/Maher Terminals*, 114 U.S. 2251 (1994). To modify benefits pursuant to Section 22, the LHWCA requires that the employer prove by a preponderance of the evidence that the economic disability no longer exists. Metropolitan met that burden. The possibility that disability might recur – the Ninth Circuit's doubt that the current absence of economic loss would forever continue – is an insufficient basis for a continuing award.

CONCLUSION

Nominal awards may be appropriate in cases in which there is proven to be a current disability of uncertain degree. As noted in *Hole, supra*, there may be circumstances in which the use of a nominal figure is no more or less arbitrary than "picking a [more substantial] 'disability' figure out of thin air." *Hole*, at 773.

What this case questions is the propriety of a nominal award when there exists only a *possibility* of economic

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Ninth Circuit ordered a nominal award when it perceived a "significant possibility" of economic harm at "some future time." *Rambo v. Director, Office of Workers' Compensation Programs (Rambo II)*, 81 F.2d 840, 844 (9th Cir. 1996). (App. 14a) To Metropolitan, the distinction between what is and what might be and the impact of that distinction upon burdens of proof and persuasion are *very* significant.

harm in the indefinite future and when the sole rationale for the award is to indefinitely extend a clearly stated statute of limitations. Nothing in the language or history of the LHWCA carves from Section 22's time limitation an exception of the magnitude created by the Ninth Circuit.

DATED: October 1, 1996.

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No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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19 pp

QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. 901 *et seq.*, a worker engaged in maritime employment is entitled to compensation for a disability or death resulting from an injury occurring upon the navigable waters of the United States or adjoining area. Section 22 of the LHWCA, 33 U.S.C. 922, authorizes any party to seek modification of a disability award "at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim." The question presented is whether a disability award may be modified to provide for a continuing award of nominal benefits to a claimant who has suffered a permanent partial injury but who has no present loss of wage-earning capacity.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-272

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 81 F.3d 840. The opinion of this Court on a prior occasion is reported at 115 S. Ct. 2144. The earlier opinion of the court of appeals (Pet. App. 17a-20a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 21a-25a) and the administrative law judge (Pet. App. 26a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing was denied on May 22, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on August 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

> The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 22 of the Longshore Act provides in relevant part as follows:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922.

2. In 1980, Respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Company (Metropolitan). See *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2146 (1995) (*Rambo I*). Rambo filed a disability claim with the Department of Labor under the Longshore Act.[1] The Longshore Act de-

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[1] Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a) (1996). The OWCP investigates claims, and, in uncontested cases, an OWCP district director (formerly called a deputy commissioner, see 20 C.F.R. 702.105) may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain a hearing before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C.

fines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

In 1983, an administrative law judge (ALJ) accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22 1/2% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22 1/2% of his average weekly wages of $534.38. *Rambo I*, 115 S. Ct. at 2146. Under Section 8(c)(21) of the Longshore Act, Rambo therefore received an award of $80.16 per week, which represented 66 2/3% of "the difference between the [claimant's] average weekly wages [prior to his injury] and [his] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See *Rambo I*, 115 S. Ct. at 2146. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks, after which the Special Fund, which the Director of OWCP administers, became liable for the $80.16 weekly payments. *Rambo I*, 115 S. Ct. at 2146; see 33 U.S.C. 944(i)(2).[2]

919(d); 20 C.F.R. 702.316, 702.331-702.351. An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c). Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373.

[2] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the Longshore Act, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund during the preceding calendar year that are attributable to the employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

2. After receiving that award, Rambo attended crane school and obtained longshore work as a crane operator. *Rambo I*, 115 S. Ct. at 2146. He worked steadily in that position, see Pet. App. 29a, and also worked as a heavy lift truck operator in his spare time. *Rambo I*, 115 S. Ct. at 2146. Between 1985 and 1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings, although his physical condition remained unchanged. *Ibid.*

In 1989, Metropolitan sought modification of the award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, arguing that Rambo's increased earnings represented a "change in conditions" such that he is no longer "disabled" under the Act. *Rambo I*, 115 S. Ct. at 2146. In 1991, a second ALJ agreed with Metropolitan and ended Rambo's disability payments. Pet. App. 26a-32a. The ALJ reasoned that modification may be based on a post-award change in a claimant's economic condition, *id.* at 28a-29a, and determined that Rambo in fact no longer had a loss of wage-earning capacity, *id.* at 29a-31a. In particular, the ALJ found that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that

Rambo was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 30a-31a.

The Benefits Review Board affirmed. Pet. App. 21a-25a. The Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. *Id.* at 24a-25a. The Board also noted that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 25a.

3. The court of appeals reversed. Pet. App. 17a-20a. The court concluded that "only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 18a. In the view of the court of appeals, "[a] change in a claimant's wages, training, skills, or educational background is insufficient" to support modification of an award. *Id.* at 18a-19a.

4. This Court reversed and remanded, holding that an award modification may be based on an increase in the employee's wage-earning capacity owing to the acquisition of new skills, even without any change in his physical condition. *Rambo I*, 115 S. Ct. at 2147-2148, 2150. The Court explained that the Act's fundamental purpose is to compensate employees for wage-earning capacity lost because of injury; where that capacity has been reduced, restored or improved, the basis for compensation changes and the Act permits modification. *Id.* at 2148. The Court remanded the case to the court of appeals for consideration of other issues that had not been addressed on the initial appeal. *Id.* at 2150.

5. On remand, the court of appeals reversed the Benefits Review Board's order affirming the termination of Rambo's benefits and remanded for entry of a continuing nominal award. Pet. App. 2a-16a. The court observed that under Section 22 of the LHWCA, 33 U.S.C. 922,

> a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus [*sic*] award, in effect, extends a claimant's right to modification indefinitely.

Pet. App. 11a. Because a continuing nominal award "is the only mechanism available to incorporate the possible future effects of a disability in an award determination," the court concluded, it is "an appropriate mechanism" for effectuating the statute's "'forward looking' perspective in considering whether a claimant has suffered a decline in wage-earning capacity." *Id.* at 13a.

The court of appeals also determined that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and that the Board had erred in affirming the ALJ's order. Pet. App. 13a. The court found that the ALJ had overemphasized Rambo's current status and had failed to consider the effect of his permanent partial disability on his future earnings. *Ibid.* Because there remained a significant possibility that Rambo would eventually suffer economic harm as a result of his injury, the court con-

cluded, a continuing nominal award was the appropriate modification. *Id.* at 14a.

ARGUMENT

As the court of appeals recognized, the Longshore Act authorizes a continuing nominal award when a claimant's actual earnings do not fairly and reasonably reflect his long-term wage-earning capacity and there is substantial evidence that his injury will likely result in a future loss of earnings. The court's construction of the relevant LHWCA provisions does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Under the Longshore Act, an employee engaged in maritime employment who is injured while working upon the navigable waters of the United States or adjoining maritime area is entitled to compensation "in respect of disability or death." 33 U.S.C. 903(a). The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).[3] Thus, the

[3] For purposes of compensation, the Longshore Act classifies disability as either permanent total, temporary total, temporary partial or permanent partial disability. See 33 U.S.C. 908(a)-(c). For certain specified injuries resulting in permanent partial disability, incapacity to earn wages is conclusively presumed, and the claimant is entitled to compensation at the rate of 66 2/3% of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. 33 U.S.C. 908(c)(1)-(20) and (22). For "all other cases" of non-scheduled injuries involving permanent partial disability, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." 33 U.S.C. 908(c)(21); see *Rambo I*, 115 S. Ct. at 2148.

Longshore Act "does not compensate physical injury alone but the disability produced by that injury. Disability under the LHWCA, defined in terms of wage-earning capacity, is in essence an economic, not a medical concept." *Rambo I*, 115 S. Ct. at 2148 (citations omitted). The Act recognizes, however, that actual post-injury wages are not always a suitable measure of wage-earning capacity. Thus, for purposes of setting compensation for disability, the measure of the wage-earning capacity of a partially disabled employee is "his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h).

Section 8(h) further provides that, "in the interest of justice," such an employee's wage-earning capacity shall be fixed with "due regard to * * * any * * * factors or circumstances * * * which may affect his capacity to earn wages * * * including the effect of his disability *as it may naturally extend into the future.*" *Ibid.* (emphasis added).[4] The Longshore Act also recognizes that the wage-earning capacity of a disabled employee may change over time. Section 22 authorizes a district director or ALJ, "[u]pon his own initiative, or upon the application of any party in interest," to "terminate, continue, reinstate, increase, or decrease * * * compensation, or award compensation," on the grounds of either "a change in conditions" or "a mistake in a determination of fact."

[4] Other factors to be considered in setting compensation are "the nature of [the employee's] injury, the degree of physical impairment, [and] his usual employment." 33 U.S.C. 908(h).

33 U.S.C. 922. In *Rambo I*, this Court construed that provision to mean that "an award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity * * * even without any change in the employee's physical condition." 115 S. Ct. at 2150.

2. The "forward-looking perspective" of the Longshore Act in setting compensation based on a claimant's wage-earning capacity is thus reflected in both Sections 8(h) and 22. See *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir. 1981); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984); accord Pet. App. 12a-13a. Both provisions further the Act's design "to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime." *Randall*, 725 F.2d at 795. Section 22's statute of limitations restricts the authority of the district director or ALJ, however, by providing that modification must be sought within one year of the last payment of compensation or the rejection of a claim. Thus, "[a]n initial finding of no economic disability * * * may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has suffered severe economic harm." *Hole*, 640 F.2d at 772. On the other hand, "if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the compensation award may be modified years later to reflect this greater or lesser economic injury." *Ibid.*

Consequently, the practice has developed of granting nominal awards in order to prevent Section 22's

statute of limitations from foreclosing the possibility of a subsequent modification. Such nominal awards are premised on the authority of a district director or ALJ to consider, "in the interest of justice, * * * the effect of disability as it may naturally extend into the future" in determining the injured employee's wage-earning capacity. 33 U.S.C. 908(h). Nominal awards are appropriately given to injured workers who are likely to suffer a future loss of earnings as a result of their disability even though their present earnings have not declined. Since it is not always possible, at the time of a claim, to predict how much a worker's future earnings will decline as his condition deteriorates or his job prospects change, a "forward looking" finding of "some degree of economic harm, however slight," *Hole*, 640 F.2d at 772, warrants a continuing nominal award rather than outright denial of the claim (and the consequent triggering of the statute of limitations).

Petitioner's principal contention (see Pet. 7-12) is that entry of a nominal award contravenes the one-year limitations period established by Section 22.[5] That contention is incorrect. Section 22 provides

[5] The Benefits Review Board has sometimes expressed support for the same position. See *Mavar* v. *Matson Terminals, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 336, 338 (1988) (citations omitted). But see *Morin* v. *Bath Iron Works Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 205, 211 (1994); *Murphy* v. *Pro-Football, Inc.*, 24 Ben. Rev. Bd. Serv. (MB) 187, 191-192 (1991); *Burkhardt* v. *Bethlehem Steel Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 273, 277-278 (1990). Because the Benefits Review Board is an adjudicatory tribunal without administrative authority, its decisions receive no special deference from the courts. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

that no request for modification may be made more than one year after compensation has been terminated or denied. Section 22 does not address the question whether a claim should be granted or denied in the first instance. That determination is governed by Section 8(h), which makes clear that an initial award or subsequent modification may appropriately be based on the anticipated future economic effects of a claimant's injury. "While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination." Pet. App. 13a.[6] Thus, in appropriate circumstances a continuing nominal award serves the purposes of the Act as a whole without contravening the directive of Section 22.[7]

---

[6] In addition to compensation, the Longshore Act requires the employer to furnish medical services and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). A claim for medical services can be made at any time, is not dependent on a showing of loss of wage-earning capacity, and is not affected by Section 22's statute of limitations governing applications to modify compensation orders or the denial of such orders. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 991 F.2d 163, 166 (5th Cir. 1993); *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108, 1116 (5th Cir.), cert. denied, 409 U.S. 887 (1972).

[7] Petitioner misconstrues the statutory scheme (see Pet. 7-10) by failing to acknowledge that Congress enacted Section 8(h), with its provision for consideration of the anticipated future economic effects of maritime injuries, in order to mitigate the potential harsh effect of Section 22's one-year statute of limitations. See H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938). Petitioner also misconstrues Congress's intent in subsequently rejecting the proposed elimination of both the provision for consideration of the future economic effects of disability in Section

3. The courts of appeals that have addressed the question have uniformly construed Section 8(h) as authorizing a continuing nominal award under appropriate circumstances. See *Hole*, 640 F.2d at 772-773 (nominal award is appropriate when there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but the precise degree of harm cannot be determined at the time of the claim); *Randall*, 725 F.2d at 800 (nominal award is appropriate "[w]hen it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable"); *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989) (nominal award appropriate when there is substantial evidence that the claimant is likely to suffer a future loss of earnings as a result of his injury); Pet. App.

8(h) and the one-year limitations period in Section 22. In proposing those changes, the Senate committee noted the prevailing practice under which ALJs awarded "benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified." S. Rep. No. 81, 98th Cong., 1st Sess. 38 (1983). The committee stated that under the proposed statutory amendments, "[r]equests for modification will no longer be necessary simply to keep the statute of limitations from running." *Ibid.* Petitioner is incorrect in contending (Pet. 10) that Congress's retention of the one-year statute of limitations manifested an intent to bar nominal awards. To the contrary, Congress's decision not to amend the Act, despite its awareness of the ALJs' practice of making continuing nominal awards "simply to keep the statute of limitations from running," strongly suggests that Congress did not object to those awards.

14a (nominal award appropriate when there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury). Thus, the court of appeals' decision in this case is fully consistent with the law in other circuits.

Contrary to petitioner's contention (Pet. 12), the decision of the court of appeals does not conflict with the decision of the Fourth Circuit in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (1985). The court in *Fleetwood* acknowledged that the entry of a nominal award to facilitate subsequent modification "may be appropriate in some cases." *Id.* at 1234 n.9. The court explained that "[t]he basis for such an award is found in Section 908(h) of the LHWCA, which provides that an ALJ shall 'fix such wage-earning capacity as shall be reasonable, . . . including the effect of disability as it may naturally extend into the future.'" *Ibid.* (quoting 33 U.S.C. 908(h)). The court concluded, however, that "the need for a [nominal] award to protect a worker whose economic loss cannot be ascertained is not present in this case" because the claimant had "failed to present sufficient evidence for the ALJ to conclude that the degree of future economic harm is uncertain." 776 F.2d at 1234 n.9. Thus, the Fourth Circuit's refusal to order a nominal award in *Fleetwood* was based on its assessment of the facts before it, not on a legal conclusion that such an award would contravene the Act.

Contrary to petitioner's contention (Pet. 7, 14-15 n.3), the court below did not hold that the mere possibility of future economic harm is sufficient to continue nominal compensation for an employee who previously experienced a permanent partial disability. Rather, the court based its award on the uncontro-

verted facts (see Pet. App. 27a, 29a-31a) that Rambo's injury had reduced his ability to do his previous work; that his physical condition had remained unchanged since his accident; and that he did not know how long his higher-paying post-injury job would last. *Id.* at 13a. The court concluded that the ALJ's decision to terminate benefits was not supported by substantial evidence. Although the correctness of that conclusion is open to question, the court of appeals accurately stated the governing standard, and its application of that standard to the facts before it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1996

No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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CHRONOLOGY

November 28, 1983	Decision and Order Awarding Benefits Issued
October 15, 1990	Hearing on Application for Modification
May 29, 1991	Decision and Order Granting Modification
November 9, 1992	Decision and Order of Benefits Review Board Affirming Modification
June 24, 1994	Opinion of the United States Court of Appeals for the Ninth Circuit Reversing Modification
August 10, 1994	Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing
June 12, 1995	Opinion of the United States Supreme Court Reversing and Remanding
April 10, 1996	Opinion of the United States Court of Appeals for the Ninth Circuit on Remand Ordering Entry of Nominal Award
May 22, 1996	Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing
August 19, 1996	Petition for Writ of Certiorari Filed
November 27, 1996	Petition for Writ of Certiorari Granted

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California 94105

Case No. 83-LHC-242

OWCP No. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge.

DECISION AND ORDER –
AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.26 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 16, 1981, outlined in a report dated November 30, 1981. That the date of November 16, 1981, is the

appropriate date for the commencement of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical

costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions – §908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances

brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	)	
JOHN RAMBO,	)	
Claimant,	)	Case No. 83-LHC-242
vs.	)	OWCP No. 18-6945
METROPOLITAN STEVEDORE COMPANY, Self-Administered,	)	
Employer.	)	

[p. 3] PROCEEDINGS

JUDGE STEWART: This is a hearing involving a claim for compensation under the Longshore and Harbor Workers' Compensation Act. The hearing is being held in San Pedro, California, at 2:25 p.m., on October 15, 1990.

The case number is 83-LHC-242 and the OWCP number is 18-6945. This hearing is being held pursuant to the notice of hearing dated July 12, 1990.

The case has been assigned to myself, Daniel L. Stewart, to hold the hearing and to decide the case.

Will counsel for Claimant please identify himself for the record and state his name, address, and telephone number.

MR. PIERRY: Thomas James Pierry, 301 North Avalon Boulevard, Wilmington, California, 90744, (213) 834-2691.

JUDGE STEWART: Will counsel for the Employer please identify himself for the record and state his name, address, and telephone number.

MR. WOOD: James J. Wood, attorney, 3441 East Broadway, Long Beach, California, 90803, (213) 434-5703.

JUDGE STEWART: Any decision made in this case will be based solely on the record made here this afternoon. Any papers, documents, or exhibits previously submitted to or filed are not a part of the record as of this time.

[p. 4] Anyone wishing any such paper document or exhibit to become part of the evidence in this case will have to introduce it at the hearing here this afternoon.

I would prefer that all exhibits that are introduced into evidence at the hearing here this afternoon be given to the court reporter. I understand that is the procedure that you do follow here in this area, and that is the procedure which I want to follow here this afternoon.

Counsel will now be allowed an opportunity to make a brief opening statement if they so desire.

Mr. Pierry.

MR. PIERRY: Yes, Your Honor.

OPENING STATEMENT

MR. PIERRY: The trial brief that I have submitted lays out what the Claimant's position is. But for the record, so there is no misunderstanding and there is no opportunity at a later time for a court to interpret the Claimant having waived any objections to this hearing or the introduction of evidence, let me briefly summarize my trial brief.

Your Honor, may I incorporate my trial brief into the record at this point?

JUDGE STEWART: Okay. That will be fine.

MR. PIERRY: It will be Claimant's, then, first in order.

[p. 5] JUDGE STEWART: Okay.

(The document referred to was marked as Claimant's Exhibit No. 1 for identification and received into evidence.)

MR. PIERRY: Essentially, the Claimant requests the Court to dismiss these proceedings –

JUDGE STEWART: I take it you have no objection, Mr. Wood, do you?

MR. WOOD: To his trial brief?

JUDGE STEWART: Yes.

MR. WOOD: No, Your Honor. I have one of my own, plus exhibits.

JUDGE STEWART: Okay. Fine. Go ahead.

MR. PIERRY: The Claimant requests the Court to terminate these proceedings and issue an order discussing these proceedings on essentially two grounds.

In 1983, the parties appeared before Judge William Butler and settled this case. As the order that came out in early 1983 demonstrates, the parties stipulated in open court to all issues between Metropolitan Stevedore and the Claimant.

The exact language of the order that followed was in No. 6, where the parties have stipulated as follows, pursuant to 29 C.F.R. Section 18.51, No. 6:

[p. 6] "That the Employee sustained an overall – permanent partial disability equivalent to 22 1/2 percent of the whole person, which the parties recognize is an economic disability producing a weekly wage loss of $120.24 per week, with an equivalent compensation rate of $80.16 per week for permanent partial disability."

Then, Item No. 11:

"These stipulations resolve all issues between the parties, and the parties respectfully request that an award issue in accordance therewith, subject to the limitations of the Act."

The only issue that was submitted to Judge Butler was the issue of 8(f) relief for the Employer. On November 28, 1983, he issued an order granting the Employer's petition for 8(f) relief and memorializing the settlement between the parties.

The Employer, on October 30, 1989, filed a document entitled, "Employer's Application for Modification, Section 922."

I have cited the cases which basically hold that stipulations made by parties are binding upon parties who make them and that they cannot withdraw from the stipulation at this stage of the game.

What is more, I have of course cited *Clefstad* case and all the other cases, including *Sablowski*, which holds [p. 7] that contingent awards are not contrary to the statute, and the Deputy Commissioner has power to approve a settlement agreed on which is properly conditioned.

This was not a litigated cased [sic]. This was not a case that the judge issued a compensation order. For whatever reasons, the parties decided to settle this case, and they submitted it to a judge and it was settled. It was an 8(i) settlement. That plain and simple.

If it looks like a duck, and walks like a duck, and it sounds like a duck, it must be a duck. So, it was an 8(i) settlement, and the *quid pro quo* was that the Claimant agreed that he would not shoot the dice at that time and seek a greater compensation award, nor would he attempt to modify it in the future, nor can he modify it now.

And the same thing should hold true for the Employer. It is a strawman to say that the parties couldn't settle this claim because they are not allowed to settle 8(f) cases. I totally agree with that. That isn't what they were doing.

What they did was they agreed to a settlement, that the Claimant was going to get $80.16 from somebody. If the Employer lost his 8(f) petition, Metropolitan would be

on the hook and it would be an 8(i) settlement, and they would have to pay him to this day.

The fact that the Employer was fortunate enough to [p. 8] be able to get 8(f) relief can't be used now as a weapon against the Claimant to withdraw from a settlement that they already made.

The second argument that I have is – the second objection – let me clean that up. Just so the record is clear, Your Honor, I want it on the record that the Claimant formally objects to the introduction of any evidence at this hearing on the guise of a 922 petition by the Employer for the reasons stated.

In addition to that, the Employer has not submitted any medical. I make an offer of proof now that they have no current medical. It is the Claimant's condition that in this circuit, in the Ninth Circuit, since 1933 in the *McCormick* case, the Ninth Circuit has held that the change of condition to justify a 922 modification has to be predicated upon a change on medical condition.

They don't have that. There is a Fourth Circuit decision, *Fleetwood*, which was recently decided, which I have cited, and I have a copy. I would be happy to give it to the court. There is a strong dissenting opinion, by the dissenting judge in the Fourth Circuit,that indicates that there are many reasons why you have to have the medical basis for a 922 petition.

Otherwise, every time the economy hiccups, you are going to either have a line of longshoremen filing 922 [p. 9] motions or the employer is going to be filing 922 motions. It has nothing to do with the change in the economic condition

of the individual based upon his medical at the time of the finding, the time that they agreed or an order was entered establishing his disability, but rather it is due to economic conditions.

Finally, Your Honor, if this Court or any reviewing court deems that the intention of the parties in 1983, when they entered into the stipulation – that the settlement of this claim is an issue, then the Claimant objects to any other Administrative Law Judge proceeding on this case, except Judge Butler, who was there and heard it, and presumably has some record or recollection of what exactly did occur.

JUDGE STEWART: Okay. Mr. Wood.

MR. WOOD: Trying to take these items in turn, I would like to stress that counsel did not, in his pre-trial statement, make a request for a change of judge or I would have provided a case which is right on point, showing that for purposes of modification any judge can hear the proceeding. It does not have to be the judge that issued the original compensation order.

But be that as it may, with regard to the argument that this case has been settled, we have our own trial brief which the Employer would like to submit on its behalf and [p. 10] incorporate herein, which points out, we think quite clearly, with the case of *Laurence*, which is cited therein, that this cannot be a settlement of the case.

It did not conform to the provisions of Section 8(i), (a), or (b), and is therefore not a settlement. Furthermore, it is demonstrated that the process of a settlement – and I use that term in the specific word of art – particular

emphasis must be made as to the manner in which it is submitted and approved.

Lastly, it is impossible to have a settlement that binds to Special Fund, and therefore, since the Judge entertained the Section 8(f) relief, it is pretty obvious the Judge did not consider this to be a settlement.

Counsel's other argument for the Claimant relates to the parties stipulating to the facts. Of course, there are two way [sic] to get evidence before the judge. One is to put on the evidence and otherwise to stipulate. But either way, the judge is not bound by any of the evidence.

And the law requires the judge to make an independent judgment, not only with regard to Section 8(f) relief but with regard to the issue of disability, the extent thereof, and the amount of the compensation that is to be awarded.

So, even though we did enter into certain stipulated facts, the judge still, by law, had to make an [p. 11] independent judgment. And our exhibits include a copy of his decision. Now, in this case it is true, he did incorporate the parties' stipulation on disability. But we all know that he didn't have to do that.

In any event with regard to counsel's objection to the Employer seeking modification pursuant to Section 22, we have covered that with the authority right within the section, which provides that, even though the Special Fund is paying the claimant, the employer, as an interested party, is entitled to seek modification if the facts warrant it.

Next, with regard to no medical, counsel is relying on a case – I think he said 1933. This Act has been amended in 1984, and there are other cases since then which clearly support a change of condition based on economic grounds as a valid basis to pursue modification.

That is what the Employer is doing in this case.

Separate from those items, we simply show that this individual has continued working in the same industry he has worked in before. He has not made a change into some other industry, which might be temporary in nature and potentially leave open for the future some further diminished earnings.

As it is, this gentleman is earning approximately $1700 a week. At the time of the award, he was earning [p. 12] approximately $545 a week. Now, we are well aware – and we wouldn't trouble the Court with this proceeding, by way of our application, if it was simply a matter of telling the Court that, well, $1700 is a lot more than $545, and therefore, it should be modified.

What we have done and what we propose to do here, with our exhibits, is to demonstrate that no matter how you approach this earnings increase, throughout the time span involved, whether you use the national average weekly wage based on inflationary factors or whether you use the actual union increases which come into play by way of union contract agreements every year, that he would have no reasonable basis whatever, through normal attrition of these benefits, to be making the kind of money he is making now.

So, he is still making at least $600 a week more than any of these compounded benefits for the time span in-between. So, in its simplest terms, we say, number one, the Employer does have the right to seek modification. Number two, this is a proper case for modification. Number three, we have earnings capacity demonstrated for this Claimant which supports our position. Thank you.

JUDGE STEWART: Okay. Do you have any evidence you want to present, Mr. Pierry? I am not going to make a decision here today, counsel. I will have to study the issue, and then I will write a written decision. But I am [p. 13] not going to make a decision at the bench here today.

MR. PIERRY: I know this has to end, Your Honor. It can't go on forever. If I may just quickly summarize and respond.

JUDGE STEWART: Okay.

MR. PIERRY: Section 908 states, "Whenever the parties to any claim for compensation under this Act agree to a settlement, Administration Law Judge shall approve the settlement."

I direct your attention to the only document we have in front of us, not what Mr. Wood says that document says, but look at the document itself. The document says, "The parties have stipulated as follows . . . " And they lay out in No. 6 just exactly what they are doing. They lay out in No. 11 that, "These stipulations resolve all issues between the parties, and the parties respectfully request award issue in accordance therewith."

That is what they did. They settled this case. If Administrative Judges want to have these cases bounced back at

them, then I suppose that is where we are going. But as far as the authority in this circuit for a 922 modification as to change of condition, the Ninth Circuit has religiously and without fail, since 1933, followed the *McCormick*, which held that in order to have a 922 modification, the condition precedent is that there was a [p. 14] physical change in the Claimant's condition since the time of the award.

The only decision that he can point to on that level is the Fourth Circuit *Fleetwood* decision, which is a vigorously dissented decision in the Fourth Circuit, with a vigorous dissent by one judge, who I greatly admire, Your Honor.

I think you are bound by the Ninth Circuit. We are sitting in San Pedro, California, and until the Ninth Circuit of the United States Supreme Court changes that decision, then I think you are bound by that decision.

JUDGE STEWART: I would agree we are bound by the law in the Ninth Circuit. Now, as to what the law in the Ninth Circuit is, that is another question. But we are bound by the law in the Ninth Circuit. There is no question about that. We are not bound by the law in the Fourth Circuit.

Do you have any evidence that you want to present at this time?

MR. PIERRY: May I submit the *Fleetwood* decision, Your Honor?

JUDGE STEWART: Okay. Fine. Now, how do you want to – you already have Claimant's Exhibit No. 1, which has been admitted into evidence. Do you want to make this Claimant's Exhibit 2?

[p. 15] MR. PIERRY: Two.

JUDGE STEWART: Do you have any objection?

MR. WOOD: Well, it is just that I think you threw me a little bit when you accepted a trial brief as an exhibit.

JUDGE STEWART: I agree, it is not evidence.

MR. WOOD: All right. That is what I –

JUDGE STEWART: There is no question about it.

MR. PIERRY: The only reason I –

MR. WOOD: Well, I –

(The document referred to was marked for identification as Claimant's Exhibit No. 2 and received into evidence.)

JUDGE STEWART: We have nothing else, I gather, here today?

MR. WOOD: I have exhibits I wish to offer.

JUDGE STEWART: Oh, okay.

MR. WOOD: And if need be, I will call the Claimant.

JUDGE STEWART: I am bending the rules; there is no question, Mr. Wood. Because it is not evidence.

MR. WOOD: Well, I don't care what number it is given, just so it is not evidence, that is all.

MR. PIERRY: Just as long as it is on the record. I don't want it to be like the –

[p. 16] JUDGE STEWART: Right. Right –

MR. PIERRY: – *Pigrenet* decision, where later the BRB ducts [sic] the issue by saying it wasn't raised by the Claimant at the hearing, therefore it was waived.

JUDGE STEWART: I understand your position, Mr. Pierry. You are trying to make exactly clear what your legal position is.

MR. PIERRY: Thank you.

JUDGE STEWART: And you want me to have access to all of the cases that are pertinent to this particular decision. And I appreciate your effort.

MR. PIERRY: Thank you.

JUDGE STEWART: As far as evidence, it is not evidence.

Does that complete your case, Mr. Pierry?

MR. PIERRY: I don't put the case on. He has got the –

JUDGE STEWART: Yes, I know.

MR. PIERRY: Oh. This completes my statement, yes.

JUDGE STEWART: Okay. Fine.

MR. WOOD: Your Honor, we would like to offer Employer's trial brief and the exhibits, if we may.

MR. PIERRY: I have objections to each and every one of them.

[p. 17] JUDGE STEWART: Okay.

MR. WOOD: That is the brief and the exhibits that he is going to argue about, I believe.

JUDGE STEWART: Okay. And you have identified the exhibits as Exhibits A through H.

(The documents referred to were marked for identification as Employer's Exhibits A through H.)

JUDGE STEWART: Mr. Pierry, you have objections to every one of them?

MR. PIERRY: Every single one of them, Your Honor.

JUDGE STEWART: What is your objection to Exhibit A?

MR. PIERRY: Exhibit A, I don't know what it is. It is on Mr. Jim Wood's stationery. I have no idea where these figures came from. He has no affidavit, no jurat by anybody, certifying what these numbers are. I haven't got the faintest idea what they are and I don't believe the Court does either.

JUDGE STEWART: Do you want to respond, Mr. Wood?

MR. WOOD: Yes. These exhibits are numbered in sequence, as the Court said, starting with Exhibit A, and all the pages are numbered.

The Court will note on Page 2 is a breakdown tabulated by the Department of Labor.

[p. 18] MR. PIERRY: I have no objection to that document.

MR. WOOD: That in turn provides the basis for Page 1.

MR. PIERRY: I object to that, Your Honor. If the Court wishes to do some calculation, that is fine. But Mr. Wood should not be able to.

MR. WOOD: Let's let me finish, please.

JUDGE STEWART: One at a time, please. Okay, Mr. Wood.

MR. WOOD: That simply takes the mathematical significance of the numbers and translates it, using the Claimant's average weekly wage at the time of the injury, compounding it up to what it would be October 1, 1989.

So, if counsel doesn't object to Page 2, which is the foundation for Page 1, then I am not sure I appreciate the objection.

MR. PIERRY: Is Mr. Wood taking the stand and testifying as an expert in this? That is what I am objecting to. It is irrelevant and immaterial, and we have no foundation for it.

JUDGE STEWART: Your objection is overruled. It will be admitted into evidence. Employer's Exhibit A will be admitted into evidence. I appreciate your position, Mr. Pierry, but let's face it, Page 1 of Exhibit No. A goes to the weight that I am going to give this particular evidence.

[p. 19] I might not give it any weight at all, but it is admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit A, was received into evidence.)

JUDGE STEWART: What about B?

MR. PIERRY: B, Your Honor, this again – Mr. Wood asked the Court to take judicial notice of some fellow by the name of Mike Carmelich and what he said in some other case.

And if he wants to have Mr. Carmelich come in and testify and make an offer of proof – he is available; I spoke to him last week. He is in town. I object to this evidence coming in. Again, it is without foundation. I don't know what it proves.

JUDGE STEWART: Mr. Wood, I think you have a serious problem as to Exhibit No. B.

MR. WOOD: Well, Your Honor, on Page 4 I cite the authority which clearly states, on 29 C.F.R. 18.48, that records and other proceedings may be offered in similar proceedings.

Now, we have already been through this modification procedure in the *Henry Corbos* (ph.) case. And –

[p. 20] MR. PIERRY: I –

MR. WOOD: Just a second. And Mr. Carmelich did testify and he did offer – the claimant offered into evidence this very same documentation.

It is nothing more than a guideline of the yearly basic longshore pay increase on hourly rates. And if he has an argument against it, it is not with me. He has been served

before this trial – I didn't just serve it on him today. He was served, whatever it is, 10 or 12 days ago with this document.

And I don't understand why he would have an objection to it.

MR. PIERRY: Your Honor, let me cite to you the case of *Jordon versus Davis Construction Corporation*. It is a BRB decision, on judicial notice. And the Court makes it very clear that even where the administrative tribunal may take judicial notice of extra record facts, because of the vulnerable position in which the opponent is placed by judicial notice, the administrative law judge must be concerned with certain protective measures.

I don't have any chance to cross examine this man. I have no idea where these records came from or the truth or veracity of them. I believe it is an improper exhibit. May I give the case – Claimant's 3.

JUDGE STEWART: Yes.

[p. 21] (The document referred to was marked for identification as Claimant's Exhibit No. 3 and received into evidence.)

MR. PIERRY: 9 Benefits Review Board's –

JUDGE STEWART: I agree Mr. Pierry. I am going to sustain your objection.

MR. WOOD: With regard to that item, Your Honor, we would like to then extract it from our exhibits and append it to our pre-trial brief.

JUDGE STEWART: Okay.

MR. WOOD: Since that is not an exhibit for evidence.

JUDGE STEWART: Right.

MR. WOOD: So, may I jerk it out of there.

JUDGE STEWART: Okay. Fine.

(The document referred to, having been previously marked for identification as Employer's Exhibit B, was withdrawn from evidence.)

MR. WOOD: What was the citation on *Davis – Jordan versus Davis,* BRB?

MR. PIERRY: 9 Benefits Review Board Service – (NOISE) –

MR. WOOD: Volume 9 did you say?

[p. 22] MR. PIERRY: 9.

MR. WOOD: Thank you very much.

JUDGE STEWART: Okay. Now, what is your objection to Exhibit No. C?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. C will be admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibit C, was received into evidence.)

JUDGE STEWART: What about D?

MR. PIERRY: Yes, I object to that, Your Honor.

JUDGE STEWART: What is your objection?

MR. PIERRY: I have no objection to the PMA records, which it is cut off on my exhibit, but it is the last seven pages of that exhibit. I only object to the cover sheet where Mr. Wood gives us the benefit of his evaluation of what these records mean.

MR. WOOD: Could you identify that by a page number?

JUDGE STEWART: The problem is I have the same problem here. The bottom is cut off, and I can't tell what – oh, I see, someone has written here, at least part of them, in ink.

[p. 23] MR. WOOD: The only part that is cut off – some of that earnings came to us on fax paper, which is a little longer, so when it was photocopied, just the page number was cut off. That has nothing to do with the records.

JUDGE STEWART: No. What is it – four pages, is that what it is supposed to be?

MR. WOOD: Well, I don't know where we are, Your Honor.

MR. PIERRY: Exhibit D.

MR. WOOD: Exhibit D, as in dog –

JUDGE STEWART: In and of itself, isn't it four pages?

MR. WOOD: That is correct.

MR. PIERRY: The first page is what I object to, not the records from PMA.

JUDGE STEWART: Okay. Do you want to respond, Mr. Wood?

MR. WOOD: Yes, Your Honor. PMA records are tedious to review, and it has been our practice in many cases in my office to retype the actual information from the PMA. This takes no interpretation whatsoever, but it simply lists it in a straight line instead of horizontal and otherwise, as shown on their record.

So, we consider that to be entirely consistent with normal legal procedures. If counsel can point to a [p. 24] flaw, that would be entirely different.

MR. PIERRY: Your Honor, I don't think I have to make his case. He has to come in with admissible evidence. What he is doing now is he is testifying in this to all these exhibits. And I object. I don't have the opportunity to cross examine Mr. Wood.

I shouldn't have to point out any flaws. I think the court is capable of reading records. I think if he wants to put in records, that is fine, but I don't think he should editorialize on them, except as closing argument.

JUDGE STEWART: Your objection is overruled. Exhibit D is admitted into evidence and I will give it the appropriate weight that I think it deserves when I write my decision.

(The document referred to, having been previously marked for identification as Employer's Exhibit D, was received into evidence.)

JUDGE STEWART: What is your objection to Exhibit No. E?

MR. PIERRY: None, Your Honor.

JUDGE STEWART: Okay. Exhibit No. E, then, is admitted into evidence.

[p. 25] (The document referred to, having been previously marked for identification as Employer's Exhibit E, was received into evidence.)

JUDGE STEWART: What about F?

MR. PIERRY: Of course, I object to this whole procedure.

JUDGE STEWART: I understand. I understand your position, Mr. Pierry.

MR. PIERRY: Again, the exhibits attached to it seem to be all the exhibits that we have just done – I don't want him sneaking them in the back door, after the Court has ruled on them.

Again, I would not object to any of the PMA records that are attached, nor to the 208, but I object to Mr. Wood's cover sheet.

JUDGE STEWART: On F?

MR. PIERRY: F. That is the application.

MR. WOOD: My F is all PMA stuff.

MR. PIERRY: My F is Employer's Application for Modification, Section 922.

JUDGE STEWART: He is correct. That is what I have, too.

MR. WOOD: Oh, I beg your pardon. That is included within. That is correct. Well, that is a [p. 26]

pleadings, Your Honor. It is just informative. That is how we got here in the first place.

JUDGE STEWART: Objection overruled.

MR. PIERRY: I have no objection to G and H.

JUDGE STEWART: Okay. Then, Exhibits F, G, and H are admitted into evidence.

(The document referred to, having been previously marked for identification as Employer's Exhibits F, G, and H, were received into evidence.)

MR. WOOD: With regard to Exhibit B, Your Honor, if we may jerk that out of the collection and add it to the Employer's pre-trial brief, it would be appreciated. You have the brief.

JUDGE STEWART: Yes. You want to add it in here. Okay. (Pause.) Thank you.

Does that complete your case or are you going to have some testimony?

MR. WOOD: I would like to call the Claimant, Your Honor.

JUDGE STEWART: Okay. Fine. Mr. Rambo.

Let's go off the record a moment.

(Brief discussion off the record.)

JUDGE STEWART: Back on the record.

[p. 27] Whereupon,

JOHN RAMBO

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

JUDGE STEWART: Go ahead, Mr. Wood.

MR. PIERRY: Your Honor, again for the record, the Claimant objects to introduction of any evidence, including this testimony, for reasons already stated on the record.

JUDGE STEWART: Right. Right. Because you don't think the record should be reopened for any reason.

MR. PIERRY: That is right.

JUDGE STEWART: Okay. Go ahead, Mr. Wood.

DIRECT EXAMINATION

Q BY MR. WOOD: Would you please state your full name.

A John D. Rambo.

Q Mr. Rambo, what is your occupation?

A Longshoreman.

Q Were you so occupied in 1980, when you sustained an injury while working for Metropolitan?

A Yes.

Q Your employee number with Pacific Maritime Association, what is that?

A 333130.

Q Would you do that number again for us? 33130?

[p. 28] A 33130.

Q Yes. Thank you. I thought you had an extra 3 in there before. Are you currently employed full time for as a longshoreman?

A Yes.

Q In what capacity?

A Crane operator.

Q About how long have you been a crane operator?

A Four years – five years. Five years.

Q As a crane operator, are you working steady for anyone?

A Yes.

Q Separate from when you are working as a crane operator, do you also sign for what they call volunteer for other jobs?

A No.

Q As a crane operator – according to the Occupational Codings of Pacific Maritime Association, in the year 1988 they showed, for instance, that you put in eight hours as a dockman, for which you were paid.

A I would have to look at my time book.

Q They also show you put in 16 hours as a lift truck operator.

A Okay. I might have. I don't know.

Q They also show you put in time as a heavy lift [p. 29] truck operator. That is a little different pay, isn't it?

A That is just driving a bigger forklifts.

Q Now, if you are working steady for someone as a crane operator, how would it come about that you would sign out with classifications such as a dockman or a lift truck operator, et cetera?

A What do you mean?

Q Let's do it another way. As a steady crane operator for a particular employer, are you expected to be available to them on call?

A Yes.

Q And in exchange for that, are you guaranteed so many hours pay per week?

A Yes.

Q And as such, if they tell you that they are not going to need you on a particular day, are you then eligible to volunteer for work through the dispatch hall?

A If I go to the hall.

Q If you wish to, correct?

A Yes.

Q Now, is that the means by which you can get work as a dockman or a lift truck operator by volunteering?

A Yes.

Q And in order to do that, you would have to go through the old procedure of getting dispatched?

[p. 30] A Yes.

Q And if you do that, you get paid extra for it?

A Yes.

Q And you are still available for the guaranteed hours that your steady employer would otherwise be paying you?

A Yes.

Q Now, we have shown documents here that we have been debating – you heard us debating – from Pacific Maritime Association. Is that where your check comes from?

A Yes.

Q And on your check, the stub that comes with it, will it usually show the identity of each employer you may have worked for, assuming you worked for more than one and that employer's code or number as listed with PMA.

A Yes.

Q So, if you sit home, you can keep your own time book and make sure that you got paid for whatever day you actually work and for whom you work?

A Yes.

Q Now, is that still the way it is as of right now?

A Yes.

Q Is that the way it was before you were injured and at the time of your injury in September of 1980?

A I could volunteer then, yes.

[p. 31] Q At that time, you were not a steady crane operator, then?

A No.

Q Now, currently, they show that most of your hours, the bulk of your hours, are as a gantry crane operator?

A Yes.

Q What is a gantry crane?

A I sit in a chair, like this, with arms, and I have two handles. I just operate it.

Q Is that one of those large items over there on the waterfront that moves containers on and off of vessels?

A Yes.

Q How high off the ground is that?

A Our crane I think is 121 feet.

Q How do you get up there?

A Elevator.

Q Do you only work one crane and that one crane has an elevator?

A APL has five cranes and they all have elevators.

Q So, you are telling me, then, to get on those particular cranes it is not necessary to go up or down the ladder?

A There is a ladder there, 12 feet, 15 feet. I don't know. Then we get on an elevator.

Q So, you can use the elevator for part of the way [p. 32] and a ladder for part of the way?

A Elevator almost all the way, all the way to the top. Just 12 feet – I climb, say, a 12-foot ladder, go into the elevator, and I go up the rest of the way.

Q Okay. So, the elevator doesn't pick up until about 12 feet off the ground?

A Yes. I am guessing on the 12 feet.

Q Approximately.

A Yes.

Q And when you are doing this, this is normally your everyday job?

A Yes.

Q Before you became a steady with one particular employer – which employer is that?

A Before?

Q Excuse me. I will retract that. You are steady with whom?

A Right now?

Q Yes.

A American President Lines.

Q And before you became a steady with them, had you also worked as a crane operator through the hall?

A They picked me up when I made the list on seniority. I went with SSA. They asked me to go steady.

Q So, as soon as they knew that you were available [p. 33] as a crane operator, you were picked up by SSA?

A Yes. Seniority list.

Q And then, in the meantime, you have went over with American President Lines?

A Yes.

Q Now, they have a crane board at the union dispatch hall, as well, do they not?

A Yes.

Q I missed that.

A Yes.

Q And they also have a rule now that steady crane operators are not supposed to work more than 45 hours a week, is that true?

A Under the new contract, 42½.

Q 42½. And the reason for that is to assure that other crane operators out of the hiring hall will get work?

A Yes.

Q We don't know how much they are going to get, but they are going to get more than they would otherwise, isn't that true?

A Yes.

Q Because before some of the crane operators were working more than 45 hours a week.

A The hall was good – (Not audible.)

Q Now, is your job that you presently have of [p. 34] indefinite duration?

A No.

Q What is not definite about it? What is not indefinite about it?

A Matson laid off 50 guys. They can cut back on us and I would have to go back to the hall.

Q You are not working for Matson, right?

A No.

Q But what you are telling me is that one of the lines did lay off some people.

A Yes.

Q Has anyone told you you are being laid off?

A No.

Q Has there been anything specific said that causes you to feel, with any reasonable certainty, that your job is not going to go on indefinitely?

A I don't under –

Q If you don't understand, I would be pleased to rephrase it, if I may.

A I don't know if it is indefinitely or not.

Q But at the moment it is? What I am getting at is –

A I could be there next year. They might close down in two years, five years; I don't know.

Q All right. How long have you been there so far?

[p. 35] A Two-and-a-half years.

JUDGE STEWART: Do you know of anyone that has been laid off for any reason?

THE WITNESS: Well, Matson Company, lack of work – I heard they laid off 50 people.

JUDGE STEWART: What about your company?

THE WITNESS: Well, so far, there are only 15 or 16 of us on nights, and –

JUDGE STEWART: And no one has been laid off?

THE WITNESS: Not right now, no.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: Of that number of people, how many are crane operators?

A On nights?

Q That you just mentioned. You gave the Judge a number of 16 people.

A I think 16 on the nights.

Q All crane operators?

A Yes.

Q And as always, let's suppose that you were told that they weren't going to need you today over at American President Lines. Could you also volunteer as a crane operator out of the hall?

A If there is work?

Q That is what I mean.

[p. 36] A Yes. If there is work, which I don't go to the hall. I haven't went – I forgot about the times you told me there, but that was the last time I went.

Q I want you to assume that we have in evidence the PMA earnings records relating to your payroll. What do you estimate your average weekly wage was in 1988, approximately?

A This is '90 –

Q '88.

A That is what is am thinking – this is '90 – 75 to 80. I don't know.

Q Well, let's say the calculations show it is in excess of – around $1600 a week. Does that seem approximately right to you?

A Right now, with our new payroll, I make $1550 a week.

JUDGE STEWART: Now. But what about 1988?

THE WITNESS: I don't know what I made a week then.

Q BY MR. WOOD: In 1989, it showed, according to the payroll, that you averaged approximately $1700 a week. Does that seem correct?

A I don't know.

MR. PIERRY: Your Honor, I object. He doesn't have those records in front of him, and I think he is asking [p. 37] him to speculate. The records speak for themselves.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. WOOD: If you don't know the answer, just tell us you don't know the answer. I am just asking you does $1700 seem about correct per week?

A I can't tell you that.

Q Do you recall what you earned for the whole year in 1989?

A No, I don't.

Q But you are satisfied that every check you get comes through Pacific Maritime Association?

A Yes.

JUDGE STEWART: Do I understand correctly, Mr. Rambo, that if you were laid off at American President and you had to try to get work some place else, would your chances of getting a new job depend upon seniority?

THE WITNESS: Only in crane – it took me 20 years to become a crane operator. Then I made the list. Now, if I go back to the hall, it is whatever company wants to pick up a crane operator. There is no seniority.

JUDGE STEWART: They can pick up anyone they want?

THE WITNESS: They can pick up anyone they want.

JUDGE STEWART: Okay. Go ahead.

Q BY MR. WOOD: But nevertheless, you could still work through the hall, not only as a crane operator but in

[p. 38] any other capacity that you feel you want to work through the hall?

A I –

Q You could work like you have. You could work as a dockman if you wanted to.

A Yes.

Q Or as a heavy truck operator or –

A Yes. Something that I don't have to bend over and pick up.

Q The crane operator's work is preferred, I take it, because it pays more?

A Yes.

Q And if you are a steady, you get guaranteed hours?

A Yes.

MR. WOOD: I have nothing further, Your Honor.

CROSS EXAMINATION

Q BY MR. PIERRY: Crane operator's work is preferred, not only because it pays more but because it is an easier job, isn't it?

A Yes.

Q Physically less demanding?

A Oh, yes.

Q Has your physical condition since 1983 gotten better, or worse, or stayed the same?

A I would say at least the same, because I still [p. 39] can't do certain things.

Q And how many days a week on average do you work?

A Three, maybe four.

Q On the average, if you have 52 weeks in front of you, how many would you say you work three days per week?

A What do you mean –

Q The last 52 weeks –

MR. WOOD: I object. The question has been asked and answered, three to four days a week.

JUDGE STEWART: Objection overruled. Go ahead.

Q BY MR. PIERRY: How many weeks out of the last 52 did you work three? If you can give us a percentage, a majority, a minority, 50 percent –

A I would say the majority three, maybe four, if I am answering right.

Q When you went to crane school in 1986, there were four instructors, were there not?

A Yes, there were a few of them, yes.

Q They came and went, but there were four positions where PMA and the union had four different guys

instructing the various people that went through that class on how to operate these hammerhead cranes, correct?

A Yes.

Q They are down to one, isn't that correct?

A I don't know. Since I graduated, I couldn't tell [p. 40] you.

MR. PIERRY: I would make an offer of proof, Your Honor, that they are down to one.

MR. WOOD: Well, I object, Your Honor. We were talking about attorneys testifying.

JUDGE STEWART: Objection sustained.

Q BY MR. PIERRY: Do you know, from whatever knowledge, any source; as to what the plans of the union and the PMA to bring in more crane drivers are? Are they going to bring in more, less, the same or –

A Right now –

MR. WOOD: I object, without foundation.

Q BY MR. PIERRY: Your own knowledge, whatever you can tell us.

JUDGE STEWART: Objection is overruled.

THE WITNESS: Right now there is not enough work at the crane hall – at the hall – because that is why they are lowering our hours.

Q BY MR. PIERRY: If you lose your job at Eagle Marine, you go back to the – you work out of the hall, correct?

A Yes.

Q As low man out at the hall, isn't that right?

A Yes. You go on an hourly system.

Q Could you explain to the Court what low man out [p. 41] means?

A If we work tonight, we get eight hours – nine hours on the print. And if I go out – say I am 10 guys out and I don't get out tonight, tomorrow night I will be on, say, zero hours. This guy is on nine. Then I take a job.

Then I come back. I check in on nine, but he is on the board before me and he would get the job first.

Q Let me take you back to 1983. Your case was set for hearing before the United States Department of Labor, on Wilshire Boulevard. Do you remember that?

A Yes.

Q And you drove down with your attorney at the time, whose name was –

A Goldwater.

Q Goldwater. And after you checked in, you went down to the cafeteria, and you sat at one table and Mr. Goldwater and Mr. Wood sat at another table. Is that right?

A Yes.

Q Tell the Court what happened after that?

A They called me over there after Goldwater and Wood were talking, and Goldwater said that we were

going to get $80 – say, $80 and some change a week. And I looked at him and Wood said – Goldwater said, "This is your settlement." And then, Wood said, "You will get this as a settlement."

And I said – because the sum was little, the [p. 42] amount I was getting, I said, "Well, this isn't very much." I talked to Goldwater, and they said, "You [sic] settlement will be this for life."

Q Who said that?

MR. WOOD: Your Honor, I am going to object at this moment, to hearsay statements made by his attorney, which the attorney is alive and he is available. He could have been called as a witness. We are being quoted – I don't know what Mr. Goldwater told him, and it is irrelevant what he told him.

JUDGE STEWART: Objection sustained.

MR. PIERRY: For the record, Your Honor, may I be heard. This is percipient testimony. He is testifying to what he heard Mr. Goldwater say in front of Mr. Wood, and Mr. Wood was there. This isn't hearsay.

THE WITNESS: He told me for life.

MR. PIERRY: This is percipient testimony.

JUDGE STEWART: Mr. Wood.

MR. WOOD: It is being offered for the truth of the matter. That is what makes it hearsay. Mr. Goldwater could have told him anything. If he wants to disagree with Mr. Goldwater –

JUDGE STEWART: He said Mr. Wood.

MR. WOOD: Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I [p. 43] guess.

JUDGE STEWART: Well, he said he heard you say it. He has a right to testify as to what he heard you say.

Go ahead.

MR. PIERRY: That is all I have, Your Honor.

JUDGE STEWART: Any redirect?

REDIRECT EXAMINATION

Q BY MR. WOOD: Were you aware at all times that I was the attorney for Metropolitan, while your case was in litigation?

A Only when we went to court, as far as I remember.

Q Did you ever discuss with Mr. Goldwater the difference between a settlement and a compensation aware [sic]?

A He discussed – I don't remember everything, but I do remember sitting there in the cafeteria with both of you.

Q The word "settlement" might be – did anybody use the word –

A He said for life.

Q – resolution of the claim or submission of the facts or anything like that?

A I don't recall that. All I know is you said for life and Goldwater wrote it down on a piece of paper, and you two were taking about it.

Q He never told you about the provisions in the Act that provided for modification, in fact that you could [p. 44] modify it and get more money if you later got worse? He never discussed that with you?

A I don't know if he did or not. All I know is that it was said that I had it for life.

JUDGE STEWART: By Mr. Wood?

(Brief pause off the record.)

JUDGE STEWART: The answer was by Mr. Wood and by Mr. Goldwater.

MR. WOOD: Well, let's go back and hear it. I want to hear it myself, if I may, because the machine stopped running.

Q BY MR. WOOD: Who told you that you would have this payment for life?

A Both of you.

Q Who is both of us?

A You and Goldwater.

Q I told you that you would have this payment for life?

A We were sitting there in the cafeteria. You were on the left. You called me over later, and you were talking about what I am going to get a week. You said, "You will get this for life." Goldwater was saying – I looked at him and he said, "Well, this is the rest of your life."

And he wrote it down in the figures. "This is what you get two weeks, and you will get this for the rest [p. 45] of your life."

Q And who said that?

A Goldwater said that, and you said, "For your life."

Q I said, "For your life"? I told you that?

A You were saying – between – now you are getting me confused – between both of you that I was supposed to get this for life.

Q So, don't worry about what I said. Your attorney never told you that this case could be modified either at your request or the Employer's request?

A I don't know if he told me that or not, because I just was listening. I don't remember that.

Q Well, don't you think that would be germane to the discussion as to whether you are going to get something for life or not, if it could be modified?

A I understood I had it for life.

Q You have received your payments continuously up until today, haven't you?

A Yes.

Q And that was following the Judge's order?

A Yes.

Q So, I take it from what you say that your impression was that Mr. Goldwater was settling your case, is that what you are telling us?

[p. 46] A Yes, with you, yes.

Q With me?

A Well, I mean, we were there together. You were there with –

MR. WOOD: Your Honor, it may be that we have a mistake of fact here, and what really should happen is the award should be vacated going back to the date of its inception, if that is the case. In which event, we would request reimbursement and go to trial on the issues.

JUDGE STEWART: That is not going to happen, Mr. Wood. Go ahead.

MR. WOOD: I have nothing further.

MR. PIERRY: Nothing further, Your Honor.

JUDGE STEWART: Fine. Does that complete your case, Mr. Wood?

MR. WOOD: It does.

JUDGE STEWART: Okay. You may step down.

(Whereupon, the Witness was excused.)

JUDGE STEWART: And you had indicated you have nothing at all, Mr. Pierry, except your legal argument.

MR. PIERRY: Yes, Your Honor.

JUDGE STEWART: Okay. Fine.

Since we have the trial brief – Mr. Wood do you want to write a brief after the hearing here today, in addition, or not?

[p. 47] MR. WOOD: Well, I could for the purpose of citing the case that he brought up, the issue of whether Judge Butler had to hear this case or not.

JUDGE STEWART: Yes. Do you or don't you? That is all I want to know.

MR. WOOD: No. That is clear. I don't think it is necessary.

JUDGE STEWART: Okay. Mr. Pierry?

MR. PIERRY: No, Your Honor.

JUDGE STEWART: Okay. Fine. This hearing will be concluded at 3:13 p.m. Thank you, counsel.

(Whereupon, at 3:13 p.m., the hearing in the above-entitled matter was adjourned.)

U.S. Department of Labor Office of Administrative Law Judges
211 Main Street – Suite 600
San Francisco, California
94105

(seal)

In the Matter of JOHN RAMBO Claimant against METROPOLITAN STEVEDORE COMPANY, Self-Administered Employer	Case No. 83-LHC-242 OWCP No. 18-6945

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of 30 U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of 30 U.S.C. § 922 should be granted.

2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. Administrative Law Judge

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. Section 922 Modification

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Order must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in

which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.,* 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr.

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier work than some of the other jobs (Tr. 38).

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68,006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more

than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: MAY 29, 1991
San Francisco, California

DLS:bll

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

(seal)

BRB No. 91-1538

JOHN RAMBO Claimant-Petitioner	)	**NOT PUBLISHED**
v.	)	
METROPOLITAN STEVEDORE COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: _____
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DECISION AND ORDER (Filed Nov. 9, 1992)

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Thomas J. Pierry (Magana, Cathcart, McCarthy & Pierry), Wilmington, California, for claimant.

James J. Wood, Long Beach, California, for self-insured employer.

LuAnn Kressley (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22 1/2 percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative

law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. §928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. §922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane operator, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the

date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. §922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. §908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores,* 17 BRBS 68 (1985).

Initially, we reject claimant's assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. §908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 18

BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores,* 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority,* 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals
Judge

/s/ Nance S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

Cite as 94 C.D.O.S. 4781

JOHN RAMBO, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents,

No. 92-70783

United States Court of Appeals for the Ninth Circuit

OWCP No. 18-6945 BRB No. 91-1538

Petition for Review of an Order of the Benefits Review Board Argued and Submitted March 14, 1994 – San Francisco, California

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

COUNSEL

Thomas J. Pierry, Magana, Cathcart, McCarthy & Pierry, Wilmington, California, for the petitioner.

LuAnn Kressley, United States Department of Labor, Office of the Solicitor, Washington, D.C., for the respondents.

Filed June 24, 1994

*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week – almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[2] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training,

[2] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), *rev'd on other grounds*, 301 U.S. 174 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933), we held that a mere change in a claimant's wages – without proof of a change in his physical condition – was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See* id. at 86 (rejecting the petition for modification because it was not based upon *"a change in physical condition,"* but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. See id. at 1235 (Warriner, J., dissenting) (noting that "[b]eginning

with the first opinion dealing with the question, [*McCormick*,] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent, *United States v. Lewis*, 991 F.2d 524, 525 n.1 (9th Cir.), *cert. denied*, 114 S.Ct. 216 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir. 1944) (citing *McCormick* and *Pillsbury*, and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	)	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed Aug. 10, 1994)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

*The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 94-820

METROPOLITAN STEVEDORE COMPANY,
PETITIONER *v.* JOHN RAMBO ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 12, 1995]

JUSTICE KENNEDY delivered the opinion of the Court.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1437, as amended, 33 U. S. C. §922 (LHWCA), allows for modification of a disability award "on the ground of a change in conditions or because of a mistake in a determination of fact." The question in this case is whether a party may seek modification on the ground of "change in conditions" when there has been no change in the employee's physical condition but rather an increase in the employee's wage-earning capacity due to the acquisition of new skills.

I

In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge. After Rambo and petitioner

stipulated that Rambo sustained a 22½% permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA §8(c)(21) awarded Rambo 66⅔% of that figure, or $80.16 per week. App. 5. Because the ALJ also found that Rambo's disability was not due solely to his work-related injury and was "materially and substantially greater than that which would have resulted from the subsequent injury alone," LHWCA §8(f)(1), 33 U. S. C. §908(f)(1), he limited the period of petitioner's liability to pay compensation to 104 weeks. *Ibid.*; App. 6. Later payments were to issue from the special fund administered by respondent Director of the Office of Workers' Compensation Programs (OWCP), LHWCA §8(f)(2), 33 U. S. C. §908(f)(2). Employers (or their insurance carriers) contribute to the fund based on their outstanding liabilities. See LHWCA §44(c)(2)(B), 33 U. S. C. §944(c)(2)(B).

After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his pre-injury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner, which may seek modification even when the special fund has assumed responsibility for payments, see LHWCA §22, 33 U. S. C. §922; 20 CFR §702.148(b) (1994), filed an application to modify the disability award under LHWCA §22. Petitioner asserted there had been a "change in conditions" so that respondent was no longer "disabled" under the Act. The ALJ

agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage increases due to inflation and considering petitioner's risk of job loss and other employment prospects, the ALJ concluded Rambo "no longer has a wage-earning capacity loss" and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F. 2d 1225 (CA4 1985), which held that "change in condition[s]" means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo v. Director, OWCP*, 28 F. 3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood*, the Ninth Circuit held that LHWCA §22 authorizes modification of an award only where there has been a change in the claimant's physical condition. We granted certiorari to resolve this split, 513 U. S. ___ (1995), and now reverse.

II

The LHWCA is a comprehensive scheme to provide compensation "in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States." LHWCA §3, 33 U. S. C. §903(a). Section 22 of the Act provides for modification of awards "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U. S. C. §922. In Rambo's view and that of the Ninth Circuit, "change in conditions" means change in physical condition and does not include

changes in other conditions relevant to the initial entitlement to benefits, such as a change in wage-earning capacity. In our view, this interpretation of "change in conditions" cannot stand in the face of the language, structure, and purpose of the Act.

A

Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U. S. 469, 475 (1992); *Demarest v. Manspeaker*, 498 U. S. 184, 190 (1991).

Section 22 of the Act provides the only way to modify an award once it has issued. The section states:

> "Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . and . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U. S. C. §922.

On two occasions we have construed the phrase "mistake in a determination of fact" and observed that nothing in the statutory language supports attempts to limit it to particular kinds of factual errors or to cases involving new evidence or changed circumstances. See *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U. S. 254, 255-256 (1971) (*per curiam*); *Banks v. Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 465 (1968). The language of §22 also provides no support for Rambo's narrow construction of the phrase "change in conditions." The use of "conditions," a word in the plural, suggests that Congress did not intend to limit the bases for modifying awards to a single condition, such as an employee's physical health. See 2A N. Singer, Sutherland on Statutory Construction §47.34, p. 274 (5th rev. ed. 1992) (" 'Ordinarily the legislature by use of a plural term intends a reference to more than one matter or thing' ") (quoting N. Y. Statutes Law §252 (McKinney 1971)); cf. 1 U. S. C. §1 ("[W]ords importing the plural include the singular"). Rather, under the "normal" or "natural reading," *Estate of Cowart, supra*, at 477, the applicable "conditions" are those that entitled the employee to benefits in the first place, the same conditions on which continuing entitlement is predicated.

Our interpretation is confirmed by the language of LHWCA §§2(10) and 8(c)(21). Section 2(10) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U. S. C. §902(10). For certain injuries the statute creates a conclusive presumption of incapacity to earn wages and sets compensation at $66^{2}/_{3}\%$ of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. See

LHWCA §§8(c)(1)-(20), (22), 33 U. S. C. §§908(c)(1)-20, (22). When these types of scheduled injuries occur, a claimant simply proves that relevant physical injury and compensation follows for a finite period of time. See *Bath Iron Works Corp. v. Director, OWCP*, 506 U. S. ___, ___, n. 4 (1993) (slip op., at 3, n. 4); *Potomac Electric Power Co. v. Director, OWCP*, 449 U. S. 268, 269 (1980). "In all other cases," however, the statute provides "the compensation shall be 66²/₃% per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." LHWCA §8(c)(21), 33 U. S. C. §908(c)(21). For these non-scheduled injuries, the type at issue in this case, loss of wage-earning capacity is an element of the claimant's case, for without the statutory presumption that accompanies scheduled injuries, a claimant is not "disabled" unless he proves "incapacity because of injury to earn the wages." LHWCA §2(10), 33 U. S. C. §902(10). See *Bath Iron Works*, *supra*, at ___ (slip op., at 2-3); *Potomac Electric Power Co.*, *supra*, at 269-270. These two sections make it clear that compensation, as an initial matter, is predicated on loss of wage-earning capacity, and that such compensation should continue only "during the continuance of partial disability," LHWCA §8(c)(21), 33 U. S. C. §908(c)(21), *i.e.*, during the continuance of the "incapacity . . . to earn the wages," LHWCA §2(10), 33 U. S. C. §902(10). Section 22 accommodates this statutory requirement by providing for modification of an award on the ground of "a change in conditions." 33 U. S. C. §922.

Rambo's insistence on what seems to us a " 'narrowly technical and impractical construction' " of this phrase, *O'Keeffe*, *supra*, at 255 (quoting *Luckenbach S. S. Co. v. Norton*, 106 F. 2d 137, 138 (CA3 1939)), does more than disregard the plain language of §§22, 2(10), and 8(c)(21). It also is inconsistent with the structure and purpose of the LHWCA. Like most other workers' compensation schemes, the LHWCA does not compensate physical injury alone but the disability produced by that injury. See LHWCA §§3(a), 8, 33 U. S. C. §§903(a), 908; see also 1C A. Larson, Law of Workmen's Compensation §57.11 (1994). Disability under the LHWCA, defined in terms of wage-earning capacity, LHWCA §2(10), is in essence an economic, not a medical concept. Cf. 3 Larson, *supra*, at §81.31(e) ("[D]isability in the compensation sense has an economic as well as a medical component"). It may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they "fairly and reasonably represent his wage-earning capacity," and if they do not, then with "due regard to the nature of [the employee's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." LHWCA §8(h), 33 U. S. C. §908(h). The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage earning capacity lost because of injury; where that wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

B

Given that the language of §22 and the structure of the Act itself leave little doubt as to Congress' intent, any argument based on legislative history is of minimal, if any, relevance. See *Connecticut Nat. Bank v. Germain*, 503 U. S. 249, 254, (1992); *Ardestani v. INS*, 502 U. S. 129, 136 (1991); cf. *Intercounty Constr. Corp. v. Walter*, 422 U. S. 1, 8 (1975) (construing ambiguity in application of §22's 1-year limitations period). In any event, we find Rambo's arguments that the legislative history provides support for his view lacking in force.

From congressional Reports accompanying amendments to § 22 in 1934, 1938, and 1984, Reports suggesting Congress was unwilling to extend the 1-year limitations period in which a party may seek modification, Rambo would have us infer that Congress intended a narrow construction of other parts of §22, including the circumstances that would justify reopening an award. We rejected this very argument in *Banks*, 390 U. S., at 465, and its logic continues to elude us. Congress' decision to maintain a 1-year limitations period has no apparent relevance to which changed conditions may justify modifying an award.

Rambo next contends that following *McCormick S. S. Co. v. United States Employees' Compensation Comm'n*, 64 F. 2d 84 (CA9 1933), the Courts of Appeals unanimously held that "change in conditions" refers only to changes in physical conditions, so Congress's reenactment of the phrase "change in conditions" when it amended other parts of §22 as late as 1984 must be understood to

endorse that approach. We have often relied on Congress's "reenact[ment of] statutory language that has been given a consistent judicial construction," *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U. S. ___, ___ (1994) (slip op., at 21); see *Pierce v. Underwood*, 487 U. S. 552, 566-567 (1988), in particular where Congress was aware of or made reference to that judicial construction, see *Brown v. Gardner*, 513 U. S. ___, ___ (1994); *United States v. Calamaro*, 354 U. S. 351, 359 (1957). The cases in the relevant period, however, were based on a misreading of *McCormick, supra*, which did not reject the idea that §22 included a change in wage-earning capacity, but merely expressed doubt that §22 "applies to a change in earnings due to economic conditions," 64 F. 2d, at 85; they involved dicta not holdings, see, *e.g., Pillsbury v. Alaska Packers Assn.*, 85 F. 2d 758, 760 (CA9 1936), rev'd on other grounds, 301 U. S. 174 (1937); *Burley Welding Works, Inc. v. Lawson*, 141 F. 2d 964, 966 (1944); *General Dynamics Corp. v. Director, OWCP*, 673 F. 2d 23, 25, n. 6 (CA1 1982) (*per curiam*); and they were not uniform in their approach, see, *e.g., Hole v. Miami Shipyards Corp.*, 640 F. 2d 769, 772 (CA5 1981) ("[T]he compensation award may be modified years later to reflect . . . greater or lesser economic injury"). Under these circumstances, we are not persuaded that congressional silence in the reenactment of the phrase "change in conditions" carries any significance.

In a related argument, Rambo criticizes petitioner's reading of §22 because it sweeps away an accumulation of more than 50 years of dicta. Far from counseling hesitation, however, we think this step long overdue. "[A]ge is no antidote to clear inconsistency with a statute,"

Brown v. Gardner, supra, at ___ (slip op., at 7), and the dictum of *Pillsbury* and *Burley Welding Works* has not even aged with integrity, see, *e.g., Fleetwood v. Newport News Shipping and Dry Dock Co.*, 16 BRBS 282 (1984); *LaFaille v. Benefits Review Board, U. S. Dept. of Labor*, 884 F. 2d 54, 62 (CA2 1989); *Avondale Shipyards, Inc. v. Guidry*, 967 F. 2d 1039, 1042, n. 6 (CA5 1992) (dictum). Breath spent repeating dicta does not infuse it with life. The unnecessary observations of these Courts of Appeals "are neither authoritative nor persuasive." *McLaren v. Fleischer*, 256 U. S. 477, 482 (1921); cf. *United States v. Estate of Donnelly*, 397 U. S. 286, 295 (1970).

Finally, Rambo argues that including a change in wage-earning capacity as a change in conditions under §22 will flood the OWCP and the courts with litigation because parties will request modification every time an employee's wages change or the economy takes a turn in one direction or the other. Experience in the 11 years since the Benefits Review Board decided *Fleetwood, supra,* suggests otherwise, but that argument is, in any case, better directed at Congress or the Director in her rulemaking capacity, see LHWCA §39(a), 33 U. S. C. §§939(a); *Director, OWCP v. Newport News Shipbuilding & Drydock Co.*, 514 U. S. ___, ___ (1995) (slip op., at 12-13), than at the courts. It is also based on a misconception of the LHWCA and our holding today. We recognize only that an award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity. A change in actual wages is controlling only when actual wages "fairly and reasonably represent . . . wage-earning capacity." LHWCA § 8(h), 33 U. S. C.

§908(h). Otherwise, wage-earning capacity may be determined according to the many factors identified in §8(h), including "any . . . factors or circumstances in the case which may affect [the employee's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." This circumspect approach does not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy. There may be cases raising difficult questions as to what constitutes a change in wage-earning capacity, but we need not address them here. Rambo acquired additional, marketable skills and the ALJ, recognizing that higher wages do not necessarily prove an increase in wage-earning capacity, took care to account for inflation and risk of job loss in evaluating Rambo's new "wage-earning capacity in an open labor market under normal employment conditions." App. 66.

We hold that a disability award may be modified under §22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. Because Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address, we reverse and remand for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 94-820

METROPOLITAN STEVEDORE COMPANY,
PETITIONER *v.* JOHN RAMBO ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 12, 1995]

JUSTICE STEVENS, dissenting.

The statutory provision that the Court construes today was enacted in 1927. Although one 1985 case reached the result the Court adopts today, *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F. 2d 1225 (CA4), over 60 years of otherwise consistent precedent accords with respondent's interpretation of the Act. For the reasons stated by Judge Warriner in his dissent in *Fleetwood*, I would not change this settled view of the law without an appropriate directive from Congress. Judge Warriner correctly observed:

> "Beginning with the first opinion dealing with the question, handed down in 1933, and continuing without wavering thereafter, the courts have uniformly interpreted the term 'change in conditions' in Section 22 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. §922 (1982), to refer exclusively to a change in the physical condition of the employee receiving compensation. This also was 'the meaning generally attributed to similar phraseology in state workman's compensation acts' in existence before or shortly

after the enactment of the LHWCA in 1927. *See Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. 315, 317 (D.Md. 1934).

"The majority's nice effort to distinguish this prior case law serves only to highlight the numerous and varied factual situations in which the federal courts have withstood temptation and have strictly adhered to this interpretation. In *McCormick Steamship Co. v. United States Employees' Compensation Commission*, 64 F. 2d 84 (9th Cir. 1933), for example, the Court refused to allow the modification of a compensation order under Section 22 where the employee's earnings were diminished as a result of deteriorating economic conditions. *Id.*, at 85. Conversely, the fact that an employee received higher wages because of better economic conditions in the 1940's was held not to constitute a 'change in conditions' so as to allow a reduction in the employee's compensation award. *Burley Welding Works v. Lawson*, 141 F. 2d 964, 966 (5th Cir. 1944). The courts have refused to find a 'change in conditions' where the employee was imprisoned in a penitentiary for life, *Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. at 316-19, or where the employee was committed to an insane asylum. *Bay Ridge Operating Co. v. Lowe*, 14 F. Supp. 280, 280-82 (S.D.N.Y. 1936).

"In every one of these cases, decided soon after the effective date of the Act, the respective courts explicitly stated and held that the term 'change in conditions' in Section 22 refers to the physical condition of the employee receiving compensation. In a more recent case, *General Dynamics, Inc. v. Director, Office of Workers' Compensation Programs*, 673 F. 2d 23 (1st Cir. 1982), the court reiterated this interpretation: '[c]ourts uniformly have held a "change in conditions"

means a change in the employee's *physical* condition, not other conditions.' *Id.*, at 25[, n. 6] (citing *Burley Welding Works, Inc. v. Lawson*, 141 F. 2d at 966).

"Despite fifty years, and more, of precedent, the majority has overturned this established construction of the term 'change in conditions' and has revised it to have it apply to changes in economic conditions occurring during the term of compensation. Such a departure from settled prior case law is not warranted absent any indication from the Congress that such a change in the statute is what is desired by the lawmakers. Congress, it should not be necessary to add, indicates its desires by adopting legislation.

* * *

"Fifty years is a long time. And perhaps it can be argued that the Board's, and the courts', and the Congress' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that the prior interpretation was not and is not the law." *Id.*, at 1235-1236 (footnotes omitted).

For those reasons, I would affirm the judgment of the Court of Appeals. Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN RAMBO, *Claimant-Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, *Respondents.*	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 OPINION

On Remand from the United States Supreme Court

Filed April 10, 1996

Before: Stephen Reinhardt and Edward Leavy, Circuit Judges, and William D. Browning,* District Judge.

Opinion by Judge Leavy;
Partial Concurrence and Partial Dissent by Judge Reinhardt

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* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

SUMMARY

Labor and Employment/Workers' Compensation/ Admiralty and Marine

On remand from the United States Supreme Court, the court of appeals denied a motion to dismiss, reversed an order of the Benefits Review Board (BRB), and remanded. The court held that a remand was warranted for entry of a nominal award of worker's compensation pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), where an award modification had been requested in regard to a claimant who suffered a permanent partial disability.

Petitioner John Rambo was injured while working as a longshore frontman for respondent Metropolitan Stevedore Co. Rambo filed a claim with the Department of Labor. An administrative law judge (ALJ) awarded him $80.16 per week in worker's compensation for a permanent partial disability pursuant to the LHWCA.

Metropolitan requested an award modification to terminate Rambo's benefits. His physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300 percent of his pre-injury average weekly wage. Section 22 of the LHWCA allows for modification of a disability award due to "a change in conditions." Rambo opposed the requested modification, arguing that he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions." The ALJ ruled that Rambo's

award of benefits did not constitute a settlement and could properly be modified. The ALJ also ruled that Rambo's new job was a "change in conditions" supporting modification. The ALJ terminated Rambo's benefits, and the BRB affirmed.

The court of appeals reversed the BRB in the belief that the "change in conditions" requirement required proof that Rambo had undergone a change in physical condition. The Supreme Court reversed, holding that a disability award may be modified under § 22 where there is a change in wage-earning capacity, even absent a change in the employee's physical condition. The Court remanded, noting that Rambo raised other arguments not addressed by the court of appeals. Metropolitan moved to dismiss Rambo's appeal for failure to raise issues before the ALJ and BRB.

[1] The ALJ and the BRB treated arguments by Rambo as assertions that there had been a "settlement." **[2]** Estoppel did not bar Metropolitan from seeking an award modification.

[3] A weekly de minimus award, in effect, extends a claimant's right to modification indefinitely. **[4]** Sections of the LHWCA require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. **[5]** A nominal award is the only mechanism available to incorporate the possible future effects of a disability in an award determination. A nominal award is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has been given an award based on a finding of permanent partial disability. **[6]** In ruling that Rambo no

longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of his permanent partial disability on future earnings. The ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence. The BRB erred in affirming the ALJ's order. [7] Because Rambo suffered a permanent partial disability, there was a significant possibility that he would at a future time suffer economic harm as a result of the injury. The appropriate award modification was a small award.

Circuit Judge Reinhardt concurred in part and dissented in part, stating that the issue of whether Rambo's employer was estopped from seeking modification of the $80.16 per week compensation award could not be decided on the record.

OPINION

LEAVY, Circuit Judge:

INTRODUCTION

This appeal is before us on remand from the Supreme Court for our consideration of issues raised originally on appeal but not discussed in our earlier decision. *Rambo v. Director, Office of Workers' Compensation Programs*, 28 F.3d 86 (9th Cir.), *rev'd and remanded sub nom., Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144 (1995). We now reverse the Benefits Review Board's order affirming the termination of Rambo's benefits and remand for entry of a nominal award.

FACTS AND PRIOR PROCEEDINGS

In 1980, appellant John Rambo (Rambo) injured his back and leg while working as a longshore frontman for Metropolitan Stevedore Company (Metropolitan). Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge (ALJ). In 1983 the ALJ awarded Rambo $80.16 per week in worker's compensation for a permanent partial disability, pursuant to § 8(c)(21) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(21) (1986) (LHWCA). Section 22 of the LHWCA allows for modification of a disability award "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. § 922. In 1990, Metropolitan requested an award modification to terminate Rambo's benefits. Rambo's physical condition had not changed, but he was working as a crane operator, a job that paid him almost 300% of his pre-injury average weekly wage. In opposing the requested modification, Rambo argued that his award could not be modified because he had been promised by Metropolitan's attorney that he would get the $80.16 weekly payment for the rest of his life, or, alternatively, that the new job was not a "change in conditions" within the meaning of 33 U.S.C. § 922. The ALJ ruled that Rambo's award of benefits did not constitute a settlement and, therefore, could properly be modified and that Rambo's new job was a "change in conditions" that supported modification. The ALJ then terminated Rambo's benefits. The Benefits Review Board (BRB) affirmed.

We reversed the BRB in the belief that the "change in conditions" requirement for an award modification under § 922 required proof that Rambo had undergone a change

in his physical condition. *Rambo*, 28 F.3d at 87. The Supreme Court reversed, holding "that a disability award may be modified under § 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition." *Metropolitan Stevedore Co.*, 115 S. Ct. at 2150. The Supreme Court remanded the case "[b]ecause Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address." *Id.*

The two issues raised by Rambo and not decided in our earlier ruling are:

> (1) Should the employer be estopped from filing a 33 U.S.C. § 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

Petitioner's Opening Brief at 7 & 9. Metropolitan moves to dismiss Rambo's appeal on the ground that these issues were not raised before the ALJ or BRB.

ANALYSIS

Standards of Review

The BRB must accept the ALJ's factual findings if they are supported by substantial evidence. 33 U.S.C. § 921(b)(3). BRB decisions are reviewed by the appellate courts for "errors of law and adherence to the substantial evidence standard." *Metropolitan Stevedore Co. v. Brickner,*

11 F.3d 887, 889 (9th Cir. 1993) (internal quotations omitted). Because the Board is not a policy-making agency, its interpretation of the LHWCA is not entitled to any special deference from the courts. We have noted, however, that we will "respect the Board's interpretation of the statute 'where that interpretation is reasonable and reflects the policy underlying the statute.' " *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1580 (9th Cir. 1985) (citations omitted) (quoting *National Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 880 (9th Cir. 1979)).

Discussion

Metropolitan moves to dismiss Rambo's appeal for failure to raise the issues before the ALJ and BRB. Issues not raised before these bodies will not be heard on appeal. *Goldsmith v. Director, Office of Workers' Compensation Programs*, 838 F.2d 1079, 1081 (9th Cir. 1988); *Long*, 767 F.2d at 1583.

> There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (citations omitted).

1. *Estoppel.*

Rambo argued to the ALJ that Metropolitan's Application for Modification under § 922 "should be dismissed because the parties settled this claim in 1983. . . . The employer agreed to pay $80.16 per week 'indefinitely.' "

On appeal to the BRB Rambo argued that there was a "settlement" between the parties and that Metropolitan was "estopped" from withdrawing from the settlement.

[1] Both the ALJ and BRB treated Rambo's arguments as assertions that the 1983 Order constituted a settlement under 33 U.S.C. § 908(i)(1). They found that the Order was not a statutory settlement and, consequently, Metropolitan could seek modification under § 922. Neither the ALJ nor the BRB ruled on the estoppel issue. That they did not rule on it is not controlling, however, if the issue was sufficiently raised below for the ALJ and BRB to rule on it. *Smiley v. Director*, 984 F.2d 278, 281 (9th Cir. 1993). The ALJ and the BRB could have ruled on the estoppel issue. Thus, Rambo can raise the estoppel argument on appeal.

Application of the estoppel doctrine requires four elements: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Ellenburg v. Brockway*, 763 F.2d 1091, 1096 (9th Cir. 1985) (citing *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981); 1 S. Williston, Williston on Contracts § 139 (3d ed. 1957)). Rambo testified before the ALJ that, on the day of his 1983 hearing, he met with his attorney and Metropolitan's attorney and they both told him that he was going to receive $80.16 per week for life. Rambo didn't recall whether his attorney told him the award could be modified. $80.16 is what Rambo was entitled to under the LHWCA for a 22½% permanent partial disability based on an average pre-injury weekly wage of

$534.38. 33 U.S.C. § 908(c)(23) (compensation equals 66⅔% of average weekly wages multiplied by the percentage of permanent impairment). The parties stipulated to the injury, the degree of disability, the compensation rate, and to an award of $80.16 per week "subject to . . . all other provisions of the [LHWCA]."

[2] Rambo received no less an award than he was entitled to under the statute. Both the ALJ and BRB determined that the 1983 "Decision and Order – Awarding Benefits" was not a settlement of Rambo's claim against Metropolitan, but an award of benefits based on the parties' stipulations and subject to modification under § 922. Thus, at least one of the elements necessary for application of estoppel is missing: reliance on Metropolitan to Rambo's detriment. Estoppel does not bar Metropolitan from seeking an award modification.

2. *Nominal Award.*

Even though Rambo did not specifically mention a nominal award before the ALJ or BRB we can consider the propriety of a nominal award on appeal. "A claim for total disability benefits includes any lesser degree of disability." *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n. 2 (1985). By contesting downward modification of his award, Rambo was asserting his right to an award of any size.

Rambo argues that the BRB should have modified his award to a nominal amount "in the interest of justice," rather than terminating it entirely. We have not determined the propriety of a nominal award to preserve the

right to future benefits in either an initial award determination or, as here, in a modification proceeding. *See Todd Shipyards v. Office of Workers' Compensation*, 792 F.2d 1489, 1491 (9th Cir. 1986). The Second, Fifth, and District of Columbia Circuits have ruled that nominal awards may be used to preserve a possible future award where there is a significant physical impairment without a present loss of earnings. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 62 (2nd Cir. 1989); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 772 (5th Cir. 1981); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C.Cir. 1984).

[3] The BRB, however, "has repeatedly expressed its dissatisfaction with de minimis awards of benefits, viewing them as judicially created infringements upon the province of the legislature because they indefinitely extend the time period provided for modification by Section 22." *Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988) (citations omitted). Under § 922, a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus award, in effect, extends a claimant's right to modification indefinitely.

Section 8(h), 33 U.S.C. § 908(h), sets forth how wage-earning capacity in cases of partial disability is determined:

> (h) The wage-earning capacity of an injured employee in cases of partial disability

> under subsection (c)(21) of this section [permanent partial disability] . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.*

33 U.S.C. § 908(h) (emphasis added).

[4] This section "allows the [ALJ] to consider the future effects of a disability." *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034, 103 S.Ct. 444, 74 L.Ed.2d 600, *citing Hole*, 640 F.2d at 772; *Lumber Mut. Casualty Ins. Co. v. O'Keefe*, 217 F.2d 720, 723 (2d Cir. 1954); *Hughes v. Litton Systems, Inc.*, 6 BRBS 301 (1977).

> The disability award provided for under the Act is designed to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime. The Benefits Review Board and the courts have mandated this "forward-looking perspective" precisely because of the short statute of limitations.

Randall, 725 F.2d at 795 (citations omitted). Both § 908 and § 922 require a "forward looking" perspective in considering whether a claimant has suffered a decline in wage-earning capacity. *Hole*, 640 F.2d at 772 (citations omitted).

[5] While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has already been given an award based on a finding of permanent partial disability.

Here the evidence is uncontroverted that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. This wage-earning capacity loss was sufficient to support a weekly benefits award. Rambo's physical condition remains unchanged. The evidence was also that Rambo, at the present time, was employed as a crane operator and was earning more than he had before his injury. Rambo also testified that he didn't know how long his job as a crane operator would last.

[6] In ruling that Rambo no longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings. Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence and the BRB erred in affirming the ALJ's order.

[7] Because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury. The LHWCA mandates a forward look in award determinations. Thus, the appropriate award modification is a small award "fashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him." *Hole*, 640 F.2d at 773.

CONCLUSION

Metropolitan's motion to dismiss is DENIED. The BRB's order affirming the termination of Rambo's benefits is REVERSED and REMANDED for entry of a nominal award.

REINHARDT, Circuit Judge, concurring in part, dissenting in part:

I dissent because the issue whether Rambo's employer is estopped from seeking modification of his $80.16 per week compensation award cannot be decided on the record before us.

Rambo argues that Metropolitan is estopped from seeking modification pursuant to 33 U.S.C. § 922 because its attorney-representative told Rambo before he agreed to numerous stipulations that the stipulated award of $80.16 would be paid to him "for life." The majority somehow concludes either that (1) Rambo did not rely on the statements of Metropolitan's attorney or (2) he did not rely on them to his detriment. I do not think the

record is sufficiently developed to permit us to reach either conclusion.

If Rambo relied on a promise by Metropolitan of an agreed-upon payment of $80.16 per week for the rest of his life and if he could have established a greater percentage of disability had he proceeded to trial as opposed to stipulating to a 22½% disability, there would be no question that he relied on Metropolitan's representation to his detriment. Unfortunately, the record before us sheds little, if any, light on the crucial issues: whether Metropolitan's counsel promised Rambo that he would receive an award that would provide a weekly payment in a fixed amount "for life;" whether, if such promise was made by Metropolitan's counsel, Rambo relied on it; and, finally, whether Rambo could have established a greater percentage disability if he had proceeded to trial.

According to Rambo, his employer's attorney did indeed promise him $80.16 per week for the rest of his life. Rambo argues that he agreed to a disability of "22½%" following the conversation during which the promise was made to him. Before us, as he did below, Rambo contends that he was induced to limit his claim to 22½% disability and not to proceed to trial by his employer's promise of a set payment for life.

The fact that the ALJ's Statement of Stipulations contained a boilerplate parenthetical phrase – "subject to . . . all other provisions of the Act" – that can be construed to subject Rambo's award to § 922 modification is by no means dispositive of whether Rambo relied on the statements of his employer's representative to his detriment. Whether Rambo was led to believe that his

agreement with Metropolitan would provide indefinite or permanent relief notwithstanding the inclusion of that parenthetical phrase in the stipulation is a factual question that should be remanded to the Benefits Review Board. I would remand the matter for further factual development that would enable the Board to resolve the estoppel issue properly.

Given the majority's disposition of the estoppel issue, however, I would agree with my colleagues that the Board erred in terminating Rambo's benefits rather than modifying them so as to provide for a nominal award. Thus, while I dissent from Section 1 of the majority opinion, I concur in Section 2.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RAMBO, Claimant-Petitioner, v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, Respondents.	)	No. 92-70783 OWCP No. 18-6945 BRB No. 91-1538 ORDER (Filed May 22, 1996)

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable William D. Browning, United States District Judge for the District of Arizona, sitting by designation.

No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

When Congress has clearly stated that rights to modify Longshore and Harbor Workers' Compensation Act awards should end one year after the last payment of compensation, may a Court of Appeals order a small award "fashioned expressly" to indefinitely extend that period?

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs,

United States Department of Labor

[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Opinion of the Ninth Circuit (J.A. 81) is reported at 81 F.3d 840. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (J.A. 96) is unpublished. The Opinion of the Ninth Circuit originally reversed by this Court (J.A. 62) is reported at 28 F.3d 86. The Decision and Order of the Benefits Review Board (J.A. 57) and the Administrative Law Judge's Decision and Order Granting Modification (J.A. 50) are unreported. The Opinion of this Court (J.A. 67) reversing and remanding to the Ninth Circuit is reported at 115 S.Ct. 2144.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 10, 1996. (J.A. 81) A timely Petition for Rehearing filed by Metropolitan was denied on May 22, 1996. (J.A. 96) The Petition for a Writ of Certiorari was filed on August 19, 1996 and granted on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(h) and 22 of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. Sections 908(h) and 922, provide in relevant part as follows:

MODIFICATION OF AWARDS

8(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . , the deputy commissioner may at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

STATEMENT

Much of the factual background pertinent to the question presented was summarized within this Court's opinion in *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 115 S.Ct. 2144 (1995).

> In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge. After Rambo and petitioner stipulated that Rambo sustained a 22 1/2 % permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA § 8(c)(21) awarded Rambo 66 2/3 % of that figure, or $80.16 per week. . . .
>
> After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his pre-injury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner . . . filed an application to modify the disability award under LHWCA § 22. Petitioner asserted there had been a 'change in conditions' so that respondent was no longer 'disabled' under the Act. The ALJ agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage

increases due to inflation and considering petitioner's risk of job loss and other employment prospects, the ALJ concluded Rambo 'no longer has a wage-earning capacity loss' and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F.2d 1225 (CA4 1985), which held that 'change in condition[s]' means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo v. Director,* OWCP, 28 F.3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood,* the Ninth Circuit held that LHWCA § 22 authorizes modification of an award only where there has been a change in the claimant's physical condition.

Rambo I, 115 S.Ct. at 2146-47 (J.A. 67-69).

This Court reversed, holding that physical change was not necessary for modification and providing the outline of the statutory scheme essential to this review of the Ninth Circuit's subsequent ruling on remand.

> Section 2(10) defines 'disability' as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33 U.S.C. § 902(10). . . . For these non-scheduled injuries [those subject to 33 U.S.C. § 908(c)(21)], the type at issue in this case, loss of wage-earning capacity is an element of the claimant's case, for without the statutory presumption that accompanies scheduled injuries, a claimant is not 'disabled' unless he proves 'incapacity because of injury to earn the wages.' LHWCA § 2(10), 33 U.S.C.

> § 902(10). [citations omitted] These two sections make it clear that compensation, as an initial matter, is predicated on loss of wage-earning capacity, and that such compensation should continue only 'during the continuance of partial disability,' LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21), *i.e.*, during the continuance of the 'incapacity . . . to earn the wages,' LHWCA § 2(10), 33 U.S.C. § 902(10). Section 22 accommodates this statutory requirement by providing for modification of an award on the ground of 'a change in conditions.' 33 U.S.C. § 922.
>
> . . . Like most other workers' compensation schemes, the LHWCA does not compensate physical injury alone but the disability produced by that injury. [citations omitted] Disability under the LHWCA, defined in terms of wage-earning capacity, LHWCA § 2(10), is in essence an economic, not a medical concept. [citations omitted] . . . It may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they 'fairly and reasonably represent his wage-earning capacity,' and if they do not, then with 'due regard to the nature of [the employee's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.' LHWCA § 8(h), 33 U.S.C. § 908(h). The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced,

> restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

Rambo I, 115 S.Ct. at 2148 (J.A. 71).

Because Rambo had raised other arguments before the Ninth Circuit that the panel had not previously addressed, the case was remanded for further proceedings consistent with this Court's Opinion. On remand, the Ninth Circuit addressed Rambo's argument that the Board "should have modified his award to a nominal amount,"[2] reversed the orders terminating benefits, and remanded the case for entry of an award "fashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him." *Rambo II*, 81 F.3d at 845. (J.A. 89, 90, 93) Metropolitan's Request for Rehearing and Suggestion for Rehearing *En Banc* were denied. (J.A. 96)

SUMMARY OF ARGUMENT

The Ninth Circuit's award of compensation because Rambo might at some future time suffer economic harm presumes (a) that the sole purpose of the LHWCA is to

[2] The Ninth Circuit first rejected Rambo's contention that estoppel barred Metropolitan from seeking modification. Rambo has not challenged this ruling. Rambo's "nominal award" claim had not been presented to either the ALJ or the Board but was found by the court to be implicit in his defense against Metropolitan's modification effort. *Rambo v. Director, Office of Workers' Compensation Programs (Rambo II)*, 81 F.3d 840, 843 (9th Cir. 1996) (J.A. 89).

provide complete remedies for all injured workers, (b) that Congress, itself unwilling to expressly lengthen or suspend the running of a statute of limitation, has delegated that authority to judicial discretion, and (c) that a court may disregard compelling statutory terms and established canons of statutory construction whenever their application might result in hardship to an individual claimant.

Only these presumptions can support the award of compensation to a worker who no longer experiences a disability. Only these beliefs can transform doubts about the future into a present entitlement. No other contentions can possibly underlie defense of the Ninth Circuit's willful disregard of Congress' one-year limitation on modification remedies and this Court's repeated directives that the Legislature's clearly expressed judgments be enforced. Each, however, is misguided.

The LHWCA does not guarantee a complete remedy for all work-related disabilities. It is, instead, a compromise of competing interests, a *legislative* choice not subject to judicial rebalancing and revision. Courts have no license to disregard clear statutory language because they appraise the results as unwise or overly harsh. Courts *must* learn to heed this Court's repeated admonitions against the substitution of judicial perceptions of wisdom and fairness for those clearly expressed by Congress.

The "nominal award" ordered by the Ninth Circuit was a mere device, a fiction adopted for the transparent purpose of evading Congress' one-year time limitation. The lesson of *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952), must be once again taught.

> We are aware that [the LHWCA] is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all.

ARGUMENT

A. THE NOMINAL AWARD DEVICE WRECKS THE STATUTORY SCHEME, VIOLATING THE DISTINCTION BETWEEN "INJURY" AND "DISABILITY," THE ENTITLEMENT LIMIT OF § 8(c)(21), § 22'S TIME LIMITATIONS, THE NINTH CIRCUIT'S LIMITED REVIEW AUTHORITY, AND THIS COURT'S REPEATED RULINGS.

The primary synonyms for "nominal" listed in ROGET'S 21ST CENTURY THESAURUS (Dell Publishing, 1992, p. 575) include "alleged," "apparent," "in effect [or name] only," "pretended," "professed," "puppet," "purported," and "seeming." All of these adjectives accurately describe the award which the Ninth Circuit has ordered. Each illuminates what use of the term "nominal" obscures.

Rambo has been awarded compensation to which he is *not* entitled. The award was a mere device to avoid limits upon Rambo's right to seek modification, a fiction written to extend indefinitely a statutory one-year deadline. The statutory framework and history clearly demonstrate that the use of this device not only rewrites Section 22, it also violates the LHWCA's clear distinction between "injury" and "disability" and erases Section 8(c)(21)'s express limitation upon compensation entitlement.

Rambo's initial entitlement to LHWCA compensation derived from Section 8(c)(21), 33 U.S.C. Section 908(c)(21). In cases governed by that statutory subsection, a claimant is entitled to receive compensation only if he experiences a wage-earning incapacity – a statutory "disability" – and for only so long as that incapacity continues. When a worker's wage-earning capacity improves or declines following the initial award or denial of compensation, Section 22 allows for modification at any time within one year following the date of the last payment of compensation or rejection of a claim for benefits. *Rambo I, supra,* at 2148 (J.A. 72); *Potomac Electric Power Co. (PEPCO) v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980).

Whether the worker does or does not experience a wage-earning incapacity is ascertained first by reference to the worker's actual post-injury earnings. If those actual earnings are determined by the Administrative Law Judge to "fairly and reasonably represent [the worker's] wage-earning capacity," the inquiry ends and a comparison of actual pre- and post-injury earnings establishes the amount of any award. If, however, the Administrative Law Judge determines that actual earnings do *not* fairly and reasonably represent the worker's ability to earn and therefore finds that *a* "disability" exists, the LHWCA requires consideration of a variety of factors "including the effect of disability as it may naturally extend into the future" and determination of an appropriate wage-earning capacity figure. 33 U.S.C. § 908(h); *Rambo I,* at 2148 (J.A. 73).

Section 7(c) of the Administrative Procedures Act governs the proceedings and imposes the burden of proof upon the proponent of a rule or order. 5 U.S.C. § 556(d).

This burden must be met by a preponderance of the evidence. Neither clear and convincing evidence nor proof beyond a reasonable doubt is required. No rule requires that doubts be resolved in a manner favoring the claimant. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries/Maher Terminals, Inc.*, 114 S.Ct. 2251, 2257 (1994).

Review of Administrative Law Judge orders is governed by Section 21 of the LHWCA, 33 U.S.C. Section 921. Both the Board and reviewing courts are bound by the Administrative Law Judge's findings of fact if those findings are supported by substantial evidence in the record considered as a whole. Neither may make factual determinations or substitute its own inferences for those drawn by the statutory factfinder. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947); and *Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935). "Substantial evidence" requires more than a scintilla but less than a preponderance. It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Both the Board and any reviewing court must consider the record "as a whole," including all that supports and detracts from the Administrative Law Judge's findings.[3] *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 133 (6th Cir. 1996).

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[3] No one can seriously argue that the Administrative Law Judge's determination that Rambo "no longer has a wage-earning capacity loss" (J.A. 55) is unsupported by substantial evidence. The Director has all but admitted the Ninth Circuit's error in this respect. (Federal Respondent's Brief in Opposition, p. 15) This Court itself noted that the ALJ "took care" in evaluating Rambo's new ability to earn "in an open labor market under normal employment conditions." *Rambo I*, at 2150 (J.A. 77).

In addition to providing a clear framework for entitlement and review, the LHWCA also establishes time limits upon both the right to file initial claims for benefits and the right to seek modification of denials and awards. Assuming that timely notice has been provided and reported, initial claims must be filed within one year following the "injury" or, if compensation has been voluntarily paid, one year after the date of the last payment. 33 U.S.C. § 913. Modification must be sought within one year following an initial denial of compensation or, if compensation has been awarded, one year following the last payment. 33 U.S.C. § 922. Both time limitations have been challenged throughout the LHWCA's history.

Challenges to the "initial claim" limitation contained in Section 13 have most often taken the form of a contention that the limitation should not begin to run until "disability" has commenced. This challenge was rejected by this Court in *Pillsbury, supra*, because (a) Section 13 itself established the "injury" as the limitation's commencement date and (b) "injury" and "disability" are defined differently in the Act.[4]

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[4] "Injury" is defined as an "accidental injury . . . arising out of and in the course of employment." It is the *physical* condition. 33 U.S.C. § 902(2). *See, generally, U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, at 615 (1982). "Disability," of course, is defined as the *economic* consequence of injury. 33 U.S.C. § 902(10).

> When Congress used 'disability' and 'injury' in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. Congress meant what it said when it limited recovery to one year from the date of injury, and 'injury' does not mean 'disability.'

Pillsbury, supra, 342 U.S., at 200 (1952).

Congress responded to *Pillsbury* and the continuing criticisms of Section 13's time limitation in 1972 and, again, in 1984 by (a) postponing the running of the one-year period until the date of awareness of the relationship between the "injury" and employment and (b) in cases of occupational disease, both extending the period to two years and delaying its running until awareness of the relationship among the injury, the work, *and* a resultant "disability."[5] *See, generally, Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 23-27 (4th Cir. 1991),

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[5] The Director's administrative resistance to time limitations has continued throughout the LHWCA's history. Even in cases of long-latency occupational disease – "injuries" for which the running of the period is expressly tolled until awareness of disability – the Director has long permitted "protective filing" to prevent the statute's running and has refused to refer these cases for formal hearing. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 135 (5th Cir. 1994). Judicial resistance to Congress' limited filing period in cases of traumatic injury continues to take the form of equating "injury" and "disability," tolling the filing date until awareness "that the injury will impair the employee's earning power," i.e., until awareness of "disability." *See Paducah Marine, supra,* at 134, and cases cited therein.

and *Paducah Marine Ways v. Thompson*, 82 F.3d 130 (6th Cir. 1996).

The legislative history regarding Section 22's time limitation is well documented. Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1437. As originally enacted, time limits on award modification were *very* strict. Review was permitted only *during* the term of an award.

In 1934, Congress rejected recommendations that there be an unlimited time period on modification and, instead, established a one-year time limit. 48 Stat. 807. In 1938, Congress extended modification to cases involving initial claim rejection but maintained the same one-year limitation. 52 Stat. 1167. Although once again presented with arguments that the one-year limitation could cause hardship, Congress chose to maintain that period while enacting Sections 8(h) and 8(i), 33 U.S.C. Sections 908(h) and 908(i), to (a) permit consideration of the "future consequences of disability" when initially determining the amount of entitlement and (b) authorize post-award settlement. S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938). In 1983, proposals to remove the one-year limitation on modification again surfaced. Congress rejected both those proposals and the accompanying suggestion to repeal the language within Section 8(h) authorizing consideration of the future effects of disability. S. Rep. No. 98-81, 98th Cong., 1st Sess. 73 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 61 (1983).[6]

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[6] In *Rambo I*, this Court read Section 22's legislative history to suggest that Congress has remained "unwilling to extend the

From this statutory scheme and its legislative and judicial history, several fundamental propositions emerge. LHWCA compensation due in cases of "unscheduled" disability is payable only for economic harm and only during its continuance; physical impairment alone does not suffice. If substantial evidence supports an Administrative Law Judge's determination that disability does *not* exist, the possibility that economic harm may some day develop or recur is not a sufficient basis for an award; a party seeking modification need not disprove all possibilities. Congress knows full well how to alleviate the effects of time limitations when it so chooses and has *not* elected to extend Section 22's one-year limitation. When Congress said "one year," it did not mean "one year, unless a Court thinks that limitation too short." Each of these propositions was violated by the Ninth Circuit.

B. NEITHER "EXTRAORDINARY CIRCUMSTANCE" NOR PERSUASIVE PRECEDENT JUSTIFIES THE NINTH CIRCUIT'S ACTION. THE LHWCA'S REMEDIAL PURPOSES DO NOT LICENSE DISREGARD OF CONGRESS' COMPELLING LANGUAGE.

Rambo argues that the Ninth Circuit correctly divined within Section 8(h) of the Act an authorization to any reviewing court

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1-year limitations period in which a party may seek modification,. . . . " *Rambo I* at 2149 (J.A. 74). Indeed, Rambo himself argued that Section 22's finite time limitation itself created an inference that the statutory grounds for modification were intended to be narrow.

> [T]o award whatever benefits it deems appropriate if, in the Court's opinion, loss MAY at some future date materialize.

(Rambo's Brief in Opposition to Petition, p. 19; emphasis in original)

To Rambo, the Director, and the Ninth Circuit, Section 8(h) is a wild card which may be played to trump Section 22's time limitation whenever a court believes it appropriate to extend a claimant's right to modification indefinitely. They overlook the fact that their reading of Section 8(h) also trumps the statutory definition of "disability," 33 U.S.C. § 902(10), the limitation on benefit entitlement ("during the continuance of partial disability") contained within 33 U.S.C. Section 908(c)(21), the distinction between "scheduled" and "unscheduled" injuries drawn in *PEPCO, supra,* and the statutory framework outlined by this Court in *Rambo I* itself.

The Ninth Circuit did not purport to identify anything within the LHWCA's legislative history which even arguably supports the proposition that Section 8(h) was intended by Congress to authorize awards for non-existent disability. However, Rambo and the Director contend that Congress' decision in 1984 to *retain* both the existing one-year limitation in Section 22 and the "forward looking" final clause of Section 8(h) was an implicit endorsement of the "nominal award" concept.

The fact that the legislative history offers no clue about Congress' reasons for rejecting the proposed repeal of both provisions and the fact that the proposals themselves resulted from a perception that nominal awards were a problem are ignored by both Rambo and the

Director.[7] Instead, Congress' "failure" to correct a perceived problem is transformed into a tacit endorsement of the practice, implicit enactment of an unwritten *proviso* to Section 22 authorizing precisely the indefinite extension that Congress itself refused.

To Metropolitan, this single snippet of legislative history falls far short of demonstrating the "most extraordinary circumstance" needed to justify a court's refusal to enforce Congress' clear statement that modification rights end one year following the date of the last payment of compensation.

> Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'

Rambo I, 115 S.Ct. 2144, 2147 (J.A. 70). *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992).

Unable to identify any clear legislative authorization permitting courts to override Section 22's time limitation whenever they believe it "appropriate," Rambo and the Director must and do resort to a playground justification for the Ninth Circuit's action, the argument that approvals of "nominal awards" by other Circuits justify the Ninth Circuit's departure from settled canons of statutory construction. This effort must fail. If, as Rambo and the Director argue, the other "nominal award" decisions

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[7] *See* S. Rep. No. 98-81, 98th Cong., 1st Sess., pp. 36, 38 (1983).

cannot be distinguished from this proceeding, they too must be rejected. If error was also committed by others, that is no "antidote to clear inconsistency with a statute." *Rambo I*, at 2149 (J.A. 75), citing *Brown v. Gardner*, 115 S.Ct. 552, 557 (1994).[8]

Regardless of whether the distinctions between Rambo's circumstances and the facts of *Hole, Randall, and LaFaille* are trifling or significant and, further, regardless of whether the Fourth Circuit's assessment of the nominal award issue does or does not conflict with that of the Ninth,[9] the fact remains that the Ninth Circuit has ordered entry of an award of compensation when *only* an

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[8] In some respects *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), and *LaFaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989) are distinguishable. *Hole* arose in the context of ALJ findings that post-injury earnings did *not* fairly represent earning capacity and that the claimant *did* experience some current economic harm. Opposite findings were entered in this case. *Randall* presented much more compelling facts. *LaFaille* involved a progressively worsening condition and "employer beneficence," both found not present in Rambo's case. All, however, are suspect. *Randall* acknowledged its reliance upon the "true doubt" rule later rejected by this Court in *Greenwich Collieries*. *See Randall*, 725 F.2d, at 796. Reliance upon that same rule may have been present in both *Hole* and *LaFaille*.

[9] In *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), the court was asked to grant Fleetwood a one percent permanent partial disability award because the future effects of the physical injury were uncertain. Noting that *Hole, supra*, involved a situation in which there *was* substantial evidence of economic harm, the Fourth Circuit declined the nominal award invitation because there was insufficient evidence that the degree of future harm was uncertain. *Fleetwood, supra*, at 1235, n.9.

unproven possibility of future harm exists. No support for such an award can be found within the Act, its legislative history, or this Court's past decisions.

At the core of any attempt to justify the Ninth Circuit's fabrication of a detour around Section 22's time limitation must lie the belief that a possible loss of benefits by a worker who might sometime experience disability is too harsh for a "remedial" statute, an incongruity which courts may correct by ignoring otherwise clear statutory language. This Court has already heard and rejected the identical argument. It simply is

> [N]ot correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers. . . .
>
> * * *
>
> As this Court has observed in the past, it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results. [citation omitted] But if 'compelling language' produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language. [citation omitted] Such compelling statutory language is present in this case. . . . The fact that it leads to seemingly unjust results in particular cases does not give judges a license to disregard it.

PEPCO, supra, at 282, 283-84.

The statutory framework demonstrates that Rambo's lack of indefinite protection from all possible future harm is no incongruity. It is, instead, the result of the balance of varied rights and responsibilities struck by Congress. The Ninth Circuit possessed no license to reweigh and rebalance what Congress has so carefully considered.

CONCLUSION

The language, history, and judicial interpretation of the LHWCA forbid the Ninth Circuit's attempt to rewrite Section 22's statute of limitations to fit its perceptions of justice. Maritime workers are not entitled to compensation when only a possibility of future harm exists. The Ninth Circuit's opinion and order on remand should be reversed.

DATED: January 10, 1997.

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No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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QUESTIONS PRESENTED

Under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. 901 *et seq.*, a worker engaged in maritime employment is entitled to compensation for a disability or death resulting from an injury occurring upon the navigable waters of the United States or adjoining area. Section 8(h) of the LHWCA, 33 U.S.C. 908(h), permits consideration of the future effects of a disability on wage-earning capacity in fixing an injured employee's compensation. Section 22 of the Act, 33 U.S.C. 922, authorizes any party to seek modification of a disability award "at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim." The questions presented are:

1. Whether, and under what circumstances, the Longshore Act authorizes a continuing award of nominal benefits to a claimant who has suffered a loss of long-term wage-earning capacity but who has no present loss of earnings.

2. If the Act authorizes such an award, whether the court of appeals properly ordered a continuing nominal award in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 81 F.3d 840. The opinion of this Court on a prior occasion is reported at 115 S. Ct. 2144. The earlier opinion of the court of appeals (Pet. App. 17a-20a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (Pet. App. 21a-25a) and the administrative law judges (Pet. App. 26a-32a; App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1996. A petition for rehearing was denied on May 22, 1996. Pet. App. 1a. The petition for a writ of certiorari was filed on August 19, 1996, and was

granted on November 27, 1996. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

> The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 22 of the Longshore Act provides in relevant part as follows:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner,

> the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922.

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). For purposes of compensation, the Act classifies disability as either permanent total, temporary total, temporary partial or permanent partial disability. See 33 U.S.C. 908(a)-(c). For certain specified injuries resulting in permanent partial disability, incapacity to earn wages is conclusively presumed, and the claimant is entitled to compensation at the rate of 66 2/3% of the claimant's actual wage for a fixed number of weeks, according to a statutory schedule. 33 U.S.C. 908(c)(1)-(20) and (22). For "all other cases" of non-scheduled injuries involving permanent partial disability, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the

same employment or otherwise, payable during the continuance of partial disability." 33 U.S.C. 908(c)(21); see *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2148 (1995) (*Rambo I*).

Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases an OWCP district director (formerly called a deputy commissioner, see 20 C.F.R. 702.105) may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain a hearing before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C. 919(d); 20 C.F.R. 702.316, 702.331-702.351. An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c).

In the calculation of a permanent partial disability award under 33 U.S.C. 908(c)(21), a claimant's "wage-earning capacity * * * shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). "[I]f [the claimant's] actual earnings do not fairly and reasonably represent his wage-earning capacity," however, the district director or ALJ "may, in the interest of justice, fix such wage-earning capacity as shall be reasonable." *Ibid.* In making that determination, the district director or ALJ may consider, *inter alia*, "the effect of disability as it may naturally extend into the future." *Ibid.* Thus, "the ultimate objective of this wage-earning formula is "to determine the wage that would have been paid in the

open labor market under normal employment conditions to claimant as injured." *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984) (citations omitted),

Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373. An order awarding or denying benefits may be modified either "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. 922. A request for modification may be made "at any time prior to one year after the date of the last payment of compensation." *Ibid.*

2. In 1980, Respondent John Rambo injured his back and leg while working as a longshore "frontman" for petitioner Metropolitan Stevedore Com pany (Metropolitan). See *Rambo I*, 115 S. Ct. at 2146. Rambo filed a disability claim with the Department of Labor under the LHWCA. In 1983, an ALJ accepted a stipulation between Rambo and Metropolitan that Rambo had sustained a 22 1/2% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22 1/2% of his average weekly wages of $534.38. *Rambo I*, 115 S. Ct. at 2146. Under Section 8(c)(21) of the LHWCA, Rambo therefore received an award of $80.16 per week, which represented 66 2/3% of "the difference between the average weekly wages [prior to his injury] of the [claimant] and the [claimant's] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See *Rambo I*, 115 S. Ct. at 2146. That award was made retroactive to November 16, 1981, with payments continuing thereafter indefinitely. App., *infra*, 4a. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks,

after which the Special Fund, which the Director of OWCP administers, became liable for the $80.16 weekly payments. *Rambo I*, 115 S. Ct. at 2146; see 33 U.S.C. 944(i)(2).[1]

3. After receiving that award, Rambo attended crane school and obtained longshore work as a crane operator. *Rambo I*, 115 S. Ct. at 2146. He worked steadily in that position, see Pet. App. 29a, and also worked as a heavy lift truck operator in his spare time. *Rambo I*, 115 S. Ct. at 2146. Between 1985 and 1990, his average weekly earnings ranged from $1,307.81 to $1,690.50, or more than three times his pre-injury earnings, though his physical condition remained unchanged. *Ibid.*

In 1989, Metropolitan sought modification of the continuing award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, on the ground that Rambo's increased earnings represented a "change in conditions" such that he was no longer "disabled" under the Act. *Rambo I*, 115 S. Ct. at 2146. In 1991, a second ALJ agreed with Metropolitan and ended Rambo's disability payments. Pet. App. 26a-32a. The ALJ

[1] Although the Special Fund assumed liability for Rambo's compensation after the first 104 weeks under the award, Metropolitan retains a financial interest in the outcome of this case. Under the Longshore Act, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund during the preceding calendar year that are attributable to the employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

reasoned that modification may be based on a post-award change in a claimant's economic condition, *id.* at 28a-29a, and determined that Rambo's new skills and increased earnings constituted such a change, *id.* at 29a-31a. In particular, the ALJ found that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that Rambo's age, education, and vocational training placed him at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 30a-31a.

The Benefits Review Board affirmed. Pet. App. 21a-25a. The Board rejected Rambo's argument that modification could not be granted absent a showing of a change in the claimant's physical condition. *Id.* at 24a-25a. The Board also stated that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Id.* at 25a.

4. The court of appeals reversed. Pet. App. 17a-20a. The court concluded that "only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 18a. In the view of the court of appeals, "[a] change in a claimant's wages, training, skills, or educational background is insufficient" to support a modification of an award. *Id.* at 18a-19a.

5. This Court reversed and remanded, holding that an award modification may be based on an increase in the employee's wage-earning capacity owing to the acquisition of new skills, even without any change in

his physical condition. *Rambo I*, 115 S. Ct. at 2147-2148, 2150. The Court explained that the Act's fundamental purpose is to compensate employees for wage-earning capacity lost because of injury, and that where that capacity has been reduced, restored or improved, the basis for compensation changes and the statute permits modification. *Id.* at 2148. The Court remanded the case to the court of appeals for consideration of other issues that had not been addressed on the initial appeal. *Id.* at 2150.

6. On remand, the court of appeals reversed the Benefits Review Board's order affirming the termination of Rambo's benefits and remanded for entry of a continuing nominal award. Pet. App. 2a-16a.[2] The court observed that under Section 22 of the LHWCA, 33 U.S.C. 922,

> a compensation case may be reviewed and a new compensation order issued, which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or rejection of the claim. Thus, an initial finding of no economic disability may be modified only within one year of such finding, but a weekly de minimus [*sic*] award, in effect, extends a claimant's right to modification indefinitely.

Pet. App. 11a. Because a continuing nominal award "is the only mechanism available to incorporate the possible future effects of a disability in an award determination," the court concluded, it is "an appropriate mechanism" for effectuating the Act's "'forward looking' perspective in considering whether a claimant has suffered a decline in wage-earning capacity." *Id.* at 13a.

The court of appeals also determined that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and that the Board had erred in affirming the ALJ's order. Pet. App. 13a. The court found that the ALJ had overemphasized Rambo's current status and had failed to consider the effect of his permanent partial disability on his future earnings. *Ibid.* Because, in the court's view, there remained a significant possibility that Rambo would eventually suffer economic harm as a result of his injury, a continuing nominal award was the appropriate modification. *Id.* at 14a.[3]

SUMMARY OF ARGUMENT

1. Section 8(h) of the LHWCA governs the determination of an injured employee's "wage-earning capacity" in cases of partial disability. The district director or ALJ is expressly authorized to consider, in the interest of justice, the likely future effects of a

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[2] The court of appeals held that it could consider the propriety of a nominal award despite the fact that Rambo had not specifically requested a nominal award before either the ALJ or the Benefits Review Board. Pet. App. 10a. The court relied on Board precedent holding that "[a] claim for total benefits includes any lesser degree of disability." *Ibid.* (quoting *Young v. Todd Pac. Shipyards Corp.*, 17 Ben. Rev. Bd. Serv. (MB) 201, 204 n.2 (1985)). The court concluded that "[b]y contesting downward modification of his award, Rambo was asserting his right to an award of any size." Pet. App. 10a.

[3] The court of appeals rejected Rambo's contention that the 1983 stipulation between himself and Metropolitan constituted a binding settlement of the claim that precluded a subsequent request for modification. See Pet. App. 8a-10a. Rambo has not challenged that ruling in this Court.

claimant's injury, and to "fix such wage-earning capacity as shall be reasonable" if the claimant's current earnings do not accurately reflect his long-term wage-earning capacity. Where the claimant demonstrates that his injury will more likely than not result in a loss of earnings at some point in the future, he has shown a loss of long-term wage-earning capacity, and has thereby established a "disability" within the meaning of the Longshore Act. Under such circumstances, if the claimant is not experiencing a current loss of earnings, entry of a continuing nominal award is the appropriate course of action because it accounts for the fact that the claimant's ability to compete in the open labor market has been impaired in the long term.

2. In the foregoing circumstances, a continuing nominal award is fully consistent with both the letter and the logic of Section 22 of the Longshore Act, which governs modification of award determinations. A Longshore Act claimant who demonstrates a likelihood of future economic harm as a result of a covered injury has established a "disability" within the meaning of the Act, and a consequent eligibility for LHWCA benefits. Where the threshold question of eligibility has been resolved in the claimant's favor, a continuing nominal award furthers the policies reflected in Section 22 by permitting subsequent modification in light of changes in the claimant's earnings.

The fact that a primary purpose of a nominal award is to prevent the triggering of Section 22's one-year limitations period does not mean that such an award is inappropriate. No generally applicable principle of law requires an adjudicator, in choosing between otherwise permissible alternatives, to ignore the effect that his choice will have on the application of statutory limitations periods. Under the Longshore Act, a district director or ALJ who finds that a claimant's current wages do not accurately reflect his long-term wage-earning capacity has broad authority to act, "in the interest of justice, [to] fix such wage-earning capacity as shall be reasonable." 33 U.S.C. 908(h). That authority easily includes the discretion to consider potential limitations consequences in determining whether a claimant who satisfies the statutory eligibility requirements should receive a nominal award.

The legislative history of the Longshore Act further supports the view that a district director or ALJ may properly take account of Section 22's one-year limitations period in determining the appropriateness of a continuing nominal award. That history indicates that in enacting Section 8(h)—and, in particular, its provision for consideration of "the effect of disability as it may naturally extend into the future"—Congress intended to mitigate the potentially harsh effect of Section 22's one-year limitation on modification requests. Benefit awards based on the likelihood of future economic injury were deemed appropriate, in substantial measure, *because* such awards would prevent the triggering of the one-year limitations period. Consideration of such consequences by a district director or ALJ is therefore consistent with congressional intent.

3. The court of appeals erred, however, in ordering a continuing nominal award in this case without further proceedings before the Benefits Review Board or ALJ. Consistent with the actions of other courts of appeals in similar circumstances, the court should have remanded the case for further pro-

ceedings to determine the likely effect of Rambo's injury on his long-term wage-earning capacity. Because Metropolitan bears the burden of proof on the issue, a continuing nominal award will be appropriate unless Metropolitan demonstrates that it is more likely than not that Rambo's injury will not cause a reduction of his earnings at some time in the future.

ARGUMENT

THE LONGSHORE ACT AUTHORIZES A CONTINUING NOMINAL AWARD WHEN A CLAIMANT HAS SHOWN NO PRESENT LOSS OF EARNINGS BUT HAS ESTABLISHED THAT HE IS LIKELY TO SUFFER SUCH A LOSS IN THE FUTURE AS A RESULT OF A COVERED INJURY

Under the Longshore Act, an employee engaged in maritime employment who is injured while working upon the navigable waters of the United States or adjoining maritime area is entitled to compensation "in respect of disability or death." 33 U.S.C. 903(a).[4] The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Longshore Act "does not compensate physical injury alone

[4] In addition to compensation, the Longshore Act requires the employer to furnish medical services and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. 907(a). A claim for medical services may be made at any time, is not dependent on a showing of loss of wage-earning capacity, and is not affected by Section 22's limitations period governing applications to modify compensation orders or the denial of such orders. See *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 991 F.2d 163, 166 (5th Cir. 1993); *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108, 1116 (5th Cir.), cert. denied, 409 U.S. 887 (1972).

but the disability produced by that injury. Disability under the LHWCA, defined in terms of wage-earning capacity, is in essence an economic, not a medical concept." *Rambo I*, 115 S. Ct. at 2148 (citations omitted).

Compensation for earnings lost as a result of personal injury is not, of course, unique either to the LHWCA or to workers' compensation systems generally. Lost wages, including anticipated future lost wages, are a routine element of damages in tort actions involving personal injury. See Restatement (Second) of Torts § 924 (1979). The calculation of a one-time damages award in a tort action involves an estimation of "the difference between the earnings that the plaintiff probably would or could have received during his life expectancy but for the harm and the earnings that he will probably be able to receive during the period of his life expectancy as now determined." *Id.* at cmt. c (at 525-526).[5] The advantage of a one-time award is that it finally and definitively fixes the rights and obligations of the parties. The disadvantage lies in the inherently speculative nature of any attempt to forecast a chain of events that may extend for many years after the conclusion of the lawsuit.

Workers' compensation law reflects a quite different balance between the competing interests in finality and in precision—*i.e.*, in fashioning a compensation award that accurately reflects the extent of a claimant's disability as it may change over time. Every state workers' compensation code includes a provision for reopening and modifying awards when

[5] The amount of anticipated future losses is typically discounted to present value in order to prevent overcompensation. See Restatement (Second) of Torts § 913A.

the condition of the claimant has changed. See 3 Arthur Larson & Lex Larson, *The Law of Workmen's Compensation* § 81.10 (1996). Consistent with that approach, Section 22 of the Longshore Act provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * and * * * issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922. In *Rambo I*, this Court rejected Rambo's contention that the "change[s] in conditions" that would support the modification of an LHWCA award were limited to changes in the claimant's *medical* condition. 115 S. Ct. at 2147. Rather, the Court construed the phrase to permit modification based on a change in any condition that bears on the claimant's entitlement to benefits—*i.e.*, any condition that is relevant to the determination of wage-earning capacity. See *id.* at 2148 ("the applicable 'conditions' are those that entitled the employee to benefits in the first place, the same conditions on which continuing entitlement is predicated"); *id.* at 2150 ("a disability award may be modified under § 22 where there is a change in the employee's wage-earning capacity").

By comparison to the one-time awards characteristic of a tort regime, the LHWCA reflects a height-

ened concern for precision, and a diminished emphasis upon the prompt and final resolution of compensation disputes. The Act typically provides for periodic awards and permits modification based on changes in physical or economic conditions. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (LHWCA § 22 acts primarily as an exception to the normal rules of finality and res judicata, permitting the reopening of claims indefinitely and repeatedly, as long as the reopening occurs "prior to one year after the date of the last payment of compensation"); accord *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam). See also *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 795 (D.C. Cir. 1984) (LHWCA is designed "to compensate claimants for reductions in wage-earning capacity, resulting from the injury, as they may occur throughout the claimant's lifetime").

In one respect, however, the Longshore Act scheme does sacrifice precision for finality. Where an application for benefits has been denied, Section 22 provides that a request for modification must be made "prior to one year after the rejection of a claim." 33 U.S.C. 922. As a result of that limitation, "[a]n initial finding of no economic disability * * * may only be modified within one year of such finding, even though subsequent events make it apparent that the claimant has suffered severe economic harm." *Hole* v. *Miami Shipyards*, 640 F.2d 769, 772 (5th Cir. 1981). On the other hand, "if an initial determination is made that a claimant has suffered some degree of economic harm, however slight, and circumstances later develop indicating that the claimant was harmed to a greater or lesser degree than was originally apparent, the com-

pensation award may be modified years later to reflect this greater or lesser economic injury." *Ibid.*

The position of the Director, OWCP, is that a continuing award of nominal benefits is proper whenever a claimant has suffered no present loss of earnings but has an injury that will, more likely than not, cause such a loss in the future. Such a claimant is disabled within the meaning of the Act because his ability to compete in the open labor market has been impaired, although the extent of his disability in terms of loss of wage-earning capacity is as yet indeterminate. Under those circumstances, a continuing norminal award is consistent with the statutory provisions governing eligibility for partial disability benefits; it neither conflicts with Section 22's one-year limitation on requests for modification nor subverts that Section's proper operation; and it furthers the effective administration of the statutory scheme taken as a whole.[6]

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[6] The Director, OWCP, acts pursuant to a delegation of authority from the Secretary, 20 C.F.R. 701.202(a), who has express authority to "administer" the LHWCA and "make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). The Director's interpretation of the Act is therefore entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1287 (1995) (Director "has full power" to supersede the decisions of the Benefits Review Board by issuing regulations setting forth her own construction of the LHWCA). See also *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987) (Director's interpretation of regulations issued under the Black Lung Benefits Act is entitled to deference).

A. A CONTINUING NOMINAL AWARD IS APPROPRIATE WHEN A LONGSHORE ACT CLAIMANT ESTABLISHES THAT HIS INJURY WILL, MORE LIKELY THAN NOT, CAUSE A REDUCTION IN HIS EARNINGS AT SOME POINT IN THE FUTURE

1. Section 8(h) of the LHWCA governs the determination of an injured employee's "wage-earning capacity" in cases of partial disability. Section 8(h)—while providing as a general rule that wage-earning capacity is to be measured by actual earnings—states in addition that

> if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his *wage-earning capacity*, the [district director] may, in the interest of justice, fix such *wage-earning capacity* as shall be reasonable, having due regard to [various enumerated factors] including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h) (emphasis added).[7] Two features of that provision are particularly relevant here.

First, the portion of Section 8(h) quoted above uses the term "wage-earning capacity" in two different places. In making the ultimate determination of "wage-earning capacity," the district director or ALJ is expressly permitted to consider "the effect of disability as it may naturally extend into the future." In that context, the term "wage-earning capacity"

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[7] Other factors to be considered in setting compensation are "the nature of [the employee's] injury, the degree of physical impairment, [and] his usual employment." 33 U.S.C. 908(h).

plainly refers to *long-term* wage-earning capacity: the statutory authorization to consider the likely future effects of a claimant's injury would be meaningless if the district director or ALJ were required to fix "wage-earning capacity" solely by reference to the wages that the claimant is *currently* capable of earning.

Because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994), the term "wage-earning capacity" should be given the same construction in the previous clause of Section 8(h). Cf. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478-479 (1992) (the term "person entitled to compensation" has the same meaning throughout the LHWCA). Thus, Section 8(h) authorizes the district director or ALJ to consider anticipated future economic injury to the claimant not only in making the ultimate assessment of wage-earning capacity, but also in making the antecedent determination that the employee's actual earnings "do not fairly and reasonably represent his wage-earning capacity." In short, Section 8(h) places no restrictions on the authority of the district director or ALJ to take into account the employee's anticipated *future* earnings in determining whether the employee has suffered a "disability" within the meaning of the Act.

Second, where the district director or ALJ concludes that current earnings do not accurately reflect the claimant's wage-earning capacity, the Act does not impose a rigid formula governing the calculation of wage-earning capacity. In particular, the Act does not specify the manner in which wage-earning capacity is to be calculated when a claimant's future

earnings appear likely to be different from his present earnings. Rather, Section 8(h) confers broad discretion upon the district director or ALJ to act "in the interest of justice" by "fix[ing] such wage-earning capacity as shall be reasonable," having due regard for the specified factors. 33 U.S.C. 908(h).

The "interest of justice" standard permits the adjudicator to consider the likelihood that the claimant's earnings will be reduced at some time in the future due to his injury, even if he suffers no current loss of earnings. In a variety of circumstances, an adjudicator might reasonably determine that a decline in future earnings is likely even where the claimant suffers no current economic injury. For instance, the injured worker may be retained by a "beneficent" employer, willing to pay more than the employee's services would command in the open labor market. The claimant's injury may be such that his physical condition can be expected to deteriorate over time, with a consequent projected loss of earnings. An injured worker who is prevented from performing his prior job may obtain remunerative employment by acquiring other skills, yet may be at a significant disadvantage in the open labor market if demand for those skills declines in the future. In any of those situations, a claimant may be able to establish that he has suffered a loss of "wage-earning capacity" within the meaning of the Act even though his current earnings are not reduced.

2. a. The courts of appeals that have addressed the question have uniformly construed Section 8(h) to authorize a continuing nominal award under appropri-

ate circumstances.[8] The Fifth Circuit in *Hole* found that the claimant's higher post-injury earnings did not fairly and reasonably represent his earning capacity where he was unable to perform his pre-injury jobs, his post-injury managerial job was temporary, and his ability to transfer to a comparable position was uncertain. 640 F.2d at 771-772. The court concluded that a continuing nominal award was justified by the ALJ's conclusion "that there is a significant possibility that [the claimant] will at some future time suffer economic harm as a result of his injury." *Id.* at 772.

In *Randall*, the D.C. Circuit held that a continuing nominal award is appropriate "[w]hen it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of

[8] The Benefits Review Board has sometimes expressed disapproval of that practice. See *Mavar* v. *Matson Terminals, Inc.*, 21 Ben. Rev. Bd. Serv. (MB) 336, 338 (1988) ("The Board has repeatedly expressed its dissatisfaction with de minimis awards of benefits, viewing them as judicially created infringements upon the province of the legislature because they indefinitely extend the time period provided for modification by Section 22.") (citing cases). More recently, however, the Board has referred to such awards with apparent approval. See, *e.g.*, *Morin* v. *Bath Iron Works Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 205, 211 (1994); *Murphy* v. *Pro-Football, Inc.*, 24 Ben. Rev. Bd. Serv. (MB) 187, 191-192 (1991); *Burkhardt* v. *Bethlehem Steel Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 273, 277-278 (1990). Because the Benefits Review Board is an adjudicatory tribunal without administrative authority, its decisions receive no special deference from the courts. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

the economic injury unknowable." 725 F.2d at 800. The court found uncontroverted evidence that the claimant could no longer perform at his pre-injury level, that his higher-paying post-injury job was not permanent, and that his job opportunities were drastically reduced. *Id.* at 799-800. The court remanded for a determination whether there was sufficient uncertainty about the claimant's future economic harm to warrant a continuing nominal award. *Id.* at 800.

In *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (1989), the Second Circuit determined that a continuing nominal award is proper "where a physically impaired worker's potential right to compensation for the substantial loss of future earnings is a predictable probability, even if it is not a certainty at the time of hearing." The court found substantial evidence that the claimant was likely to suffer a future loss of earnings "as his condition deteriorates or when his environment changes," noting that he had suffered a progressive obstructive lung disorder, was restricted in performing some of his pre-injury job tasks, and was spared demanding physical exertion by the kindness of his employers and co-workers. *Ibid.* The court remanded for consideration by the ALJ as to the appropriate periodic payment. *Ibid.*[9]

[9] *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), is not to the contrary. The court in *Fleetwood* acknowledged that the entry of a nominal award to facilitate subsequent modification "may be appropriate in some cases." *Id.* at 1234 n.9. The court explained that "[t]he basis for such an award is found in Section 908(h) of the LHWCA, which provides that an ALJ shall 'fix such wage-earning capacity as shall be reasonable, . . . including the effect of disability as it may naturally extend into the future.'" *Ibid.*

b. The courts of appeals that have authorized continuing nominal awards, however, have been less than precise in stating the standard governing such awards. The Fifth and D.C. Circuits—like the Ninth Circuit in the instant case, see Pet. App. 14a—have endorsed nominal awards premised on a "significant possibility" of future economic harm. See *Hole*, 640 F.2d at 772; *Randall*, 725 F.2d at 800. The Second Circuit has stated that such an award is proper where future economic harm is a "predictable probability," but its approving citations to *Hole* and *Randall* suggest that it attached no significance to the difference between its formulation and that employed by the other courts. See *LaFaille*, 884 F.2d at 62.

In our view, the initial entry of a continuing nominal award based on the prospect of future economic injury is appropriate if, but only if, the district director or ALJ concludes that such injury is more likely than not to occur. The prerequisite to a partial disability award under Section 8(c)(21) is, of course, a "disability," defined by the Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Benefit determinations under the LHWCA are governed by the Administrative Procedure Act (APA), including its provision that "the proponent of a rule

(quoting 33 U.S.C. 908(h)). The court concluded, however, that "the need for a [nominal] award to protect a worker whose economic loss cannot be ascertained is not present in this case" because the claimant had "failed to present sufficient evidence for the ALJ to conclude that the degree of future economic harm is uncertain." 776 F.2d at 1234 n.9. Thus, the Fourth Circuit's refusal to order a nominal award in *Fleetwood* was based on its assessment of the facts before it, not on a legal conclusion that such an award would contravene the Act.

or order has the burden of proof." 5 U.S.C. 556(d); see 33 U.S.C. 919(d) ("any hearing held under [the LHWCA] shall be conducted in accordance with the provisions of" the APA). In *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994), the Court construed the pertinent statutory provisions to impose upon an LHWCA claimant the burden of persuasion—*i.e.*, "when the evidence is evenly balanced, the benefits claimant must lose." *Id.* at 2259. Thus, the prospect of a future loss of earnings will justify initial entry of a Longshore Act award if, but only if, the claimant carries his burden of proof by establishing that such a loss is more likely than not to occur.

The instant case, however, arises out of Metropolitan's request for termination of Rambo's benefits, rather than out of the entry of an initial award. Metropolitan, as the "proponent" of the proposed "order" terminating Rambo's benefits, bears the burden of proving that Rambo is unlikely to suffer a future loss of earnings as a result of his injury.[10] The basic question—whether Rambo will more likely than not suffer future economic harm—remains the same; but in this setting the claimant rather than the employer must prevail if the evidence is in equipoise.

[10] Metropolitan acknowledges that "[t]o modify benefits pursuant to Section 22, the LHWCA requires that the employer prove by a preponderance of the evidence that the economic disability no longer exists." Pet. Reply to Br. in Opp. 4.

B. A CONTINUING NOMINAL AWARD NEITHER CONFLICTS WITH THE ONE-YEAR LIMITATIONS PERIOD ESTABLISHED BY SECTION 22 NOR SUBVERTS THE EFFECTIVE IMPLEMENTATION OF THAT PROVISION

For the foregoing reasons, a Longshore Act claimant who establishes that he is more likely than not to suffer a future loss of earnings as a result of a covered injury has satisfied the statutory prerequisites for an award of benefits. Under those circumstances, a continuing nominal award does not conflict with the one-year limitation for modification requests established by Section 22, nor does it subvert the effective implementation of that provision. To the contrary, a rule that would preclude an award of benefits in that situation would frustrate the accomplishment of the Act's objectives.

1. A continuing nominal award in no way conflicts with the text of Section 22. That Section confers broad authority upon the district director or ALJ to modify a Longshore Act award, while providing that no request for modification may be made more than one year after compensation has been terminated or denied. Section 22 does not address the question whether a claim should be granted or denied in the first instance. That determination is governed by Section 2(10) (which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury") and Section 8(h) (which prescribes the approach to be used in determining a claimant's "wage-earning capacity"). See 33 U.S.C. 902(10), 908(h).

2. Nor are the policies reflected in Section 22 subverted by a continuing nominal award to a Longshore

Act claimant who demonstrates a likelihood of future economic injury. As we explain above, Section 22 sacrifices precision to finality in one important respect. Where a claimant is found not to be entitled to LHWCA benefits *at all*, a request for modification must be made within one year after the denial or it will thereafter be barred. Once the eligibility threshold has been crossed, however, Section 22 sacrifices finality to precision by permitting subsequent increases or decreases in order to ensure that the amount of the award continues to reflect the claimant's wage-earning capacity.

A Longshore Act claimant who demonstrates a likelihood of future economic harm as a result of a covered injury has established a "disability" within the meaning of the Act, and a consequent eligibility for LHWCA benefits. Where the threshold question of eligibility has been resolved in the claimant's favor, concern for finality cannot justify outright denial of the claim. To the contrary, a continuing nominal award to a claimant who has been found to be eligible for benefits is consistent with both the letter and the logic of Section 22, since it permits subsequent modification in light of any changes in the claimant's wage-earning capacity.

3. The fact that a primary purpose of a nominal award is to prevent the triggering of Section 22's one-year limitations period does not mean that such an award is inappropriate.[11] The rule we advocate does

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[11] The courts that have addressed the question have uniformly concluded that continuing nominal awards are appropriate precisely *because* they prevent the triggering of Section 22's one-year limitation on requests for modification. See *Hole*, 640 F.2d at 773; *Randall*, 725 F.2d at 800; *LaFaille*, 884 F.2d at 62; Pet. App. 13a-14a.

not, we emphasize, permit an award of benefits to a claimant who fails to demonstrate a "disability" within the meaning of the Act. An employee who seeks a partial disability award pursuant to 33 U.S.C. 908(c)(21) must demonstrate, by a preponderance of the evidence, a present or future "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). But where a claimant demonstrates a "disability" based on a likely future loss of earnings, the decision to award nominal benefits may properly be informed by consideration of the statutory scheme taken as a whole, including both the availability of subsequent modification and the timing requirements applicable to modification requests.

No generally applicable principle of law requires an adjudicator, in choosing between otherwise permissible alternatives, to ignore the effect that his choice will have on the application of statutory limitations periods.[12] Nor does the text of the LHWCA constrain the adjudicator's discretion in this regard. To the contrary, where the district director or ALJ finds that a Longshore Act claimant's current wages do not accurately reflect his long-term wage-earning capacity, the adjudicator has broad authority to act, "in the interest of justice, [to] fix such wage-earning capac-

[12] This Court has recognized, for example, that when a federal court declines to adjudicate a lawsuit due to the pendency of a parallel state proceeding, a stay rather than a dismissal of the federal suit "will often be the preferable course, insofar as it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 n.2 (1995); accord *Deakins* v. *Monaghan*, 484 U.S. 193, 202-203 & n.7 (1988).

ity as shall be reasonable." 33 U.S.C. 908(h). That authority readily includes the discretion to consider potential limitations consequences in determining whether a claimant who satisfies the statutory eligibility requirements should receive a nominal award.

Indeed, in light of the Longshore Act's goal of compensating for disability due to work-related injury, the broad discretion conferred by the Act can be properly exercised *only* if the adjudicator is cognizant of the totality of the statutory scheme. Suppose, for example, that the Longshore Act, like common law tort judgments, contained no provision for modification of awards—*i.e.*, that a claimant in a partial disability case would continue to receive the same amount of benefits for the duration of his lifetime regardless of any change in circumstances. It might then be appropriate to award *greater than nominal* benefits to a claimant who showed no reduction in current earnings but proved a likelihood of future economic injury, so that the benefits paid over the claimant's lifetime would ultimately compensate him for the anticipated future harm. In light of the availability of modification under Section 22, however, such an award would overcompensate the claimant: having received an initial award designed to compensate for anticipated future economic injury, the employee could in effect obtain a second recovery by requesting an increase in the amount of benefits if and when the harm materialized. In "fix[ing] such wage-earning capacity as shall be reasonable," 33 U.S.C. 908(h), a district director or ALJ should surely take cognizance of the statutory scheme as a whole, including the claimant's ability to request a subsequent increase in the award pursuant to Section 22. It is equally appropriate for the district director

or ALJ to take account of Section 22's one-year limitations period in deciding whether to issue a nominal award rather than no award at all.[13]

4. The legislative history of the Longshore Act further supports the view that a district director or ALJ may properly take account of Section 22's one-year limitations period in determining the appropriateness of a continuing nominal award. Section 8(h) was added to the Longshore Act in 1938. See the Longshoremen's and Harbor Workers' Compensation Act Amendments, ch. 685, § 5, 52 Stat. 1165. The pertinent committee reports explained that Section 8(h) would

> provide[] for consideration of the effects of an injury causing permanent partial disability, upon the employee's future ability to earn. * * * Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful em-

[13] Except in cases involving "occupational disease[s]," 33 U.S.C. 913(b)(2), the LHWCA provides that a claim for disability compensation is barred unless it is filed "within one year after the injury." 33 U.S.C. 913(a). The time for filing a claim begins to run when the employee "is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury * * * and the employment." *Ibid.* Thus, if an injured employee experiences no reduction in current earnings but "has been put on the alert * * * as to the likely impairment of his earning power," the Longshore Act does not generally permit him to defer the filing of his claim until the economic harm materializes. *Stancil* v. *Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970); accord *Duluth, M. & I. R. Ry.* v. *Director, OWCP*, 43 F.3d 1206, 1208 (8th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Parker*, 935 F.2d 20, 24-27 (4th Cir. 1991).

> ployment definitely limited. * * * It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity but also the future consequences of such disability on the employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.
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> In a case such as that referred to above where the employee returns to employment without apparent wage loss, notwithstanding impairment of physical condition and probable impairment of future wage-earning capacity, an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the limitations in the act with respect to the filing of claim for compensation and right of review of the case (sec. 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus defeat the beneficent provisions of the Longshoremen's Act.

H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938).

The legislative history thus indicates that in enacting Section 8(h)—and, in particular, its provision for consideration of "the effect of disability as it may naturally extend into the future"—Congress intended to mitigate the potentially harsh effect of Section 22's one-year limitation on modification requests. Benefit awards based on the likelihood of future economic injury were deemed appropriate, in substantial measure, *because* such awards would prevent the triggering of the one-year limitations period. Consideration of such consequences by a district director or ALJ is therefore fully in accord with congressional intent.

Congress has continued to recognize the interrelation of Sections 8(h) and 22. In 1983, committees of both the House of Representatives and the Senate proposed amendments to the Longshore Act that would have eliminated both the provision for consideration of the future economic effects of disability in Section 8(h), and the one-year limitations period in Section 22. See H.R. Rep. No. 570, 98th Cong., 1st Sess. 27-28, 47, 61 (1983); S. Rep. No. 81, 98th Cong., 1st Sess. 36-38, 60, 73 (1983). In proposing those changes, the Senate Committee noted the prevailing practice under which ALJs awarded "benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified." S. Rep. No. 81, *supra*, at 38. The committee stated that under the proposed statutory amendments, "[r]equests for modification will no longer be necessary simply to keep the statute of limitations from running." *Ibid.* Although the LHWCA was amended in other significant respects

the following year, see Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1644, neither the provision for consideration of the future economic effects of disability in Section 8(h) nor the one-year limitations period in Section 22 was altered. Congress's decision to retain those provisions, despite its awareness of the ALJs' practice of making continuing nominal awards "simply to keep the statute of limitations from running," indicates that Congress regarded such awards as consistent with the statutory scheme.

C. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN ORDERING A CONTINUING NOMINAL AWARD IN THIS CASE

For the foregoing reasons, we believe that entry of a continuing nominal award is appropriate where an LHWCA claimant suffers no reduction of current earnings but establishes the likelihood of a future economic loss as a result of work-related injury. In the instant case, however, the court of appeals erred in ordering such an award without further fact-finding by the ALJ. As the court itself recognized, its role is limited to review of the decisions of the Benefits Review Board for errors of law and adherence to the substantial evidence standard. Pet. App. 7a. The Board reviews the ALJ's factual findings under the same standard. 33 U.S.C. 921(b)(3).

The second ALJ terminated Rambo's original award on the basis of his findings that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that his present employer had given no indication of an intent to lay off workers; that Rambo's age, education, and vocational training placed him at no greater risk of

losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. Pet. App. 30a-31a. The court of appeals concluded that the ALJ's decision to terminate Rambo's benefits was not supported by substantial evidence, and it criticized the ALJ for not considering the effect of Rambo's permanent partial disability on his future earnings. *Id.* at 13a. Instead of remanding for such consideration, however, the court approved a nominal award on the basis of the uncontroverted facts (see *id.* at 27a, 29a-31a) that Rambo's disability reduced his ability to do his previous work; that his physical condition had remained unchanged since his accident; and that he did not know how long his higher-paying post-injury job would last. *Id.* at 13a.

The facts cited by the court of appeals were insufficient to justify its apparent conclusion that no reasonable ALJ could have declined to order a continuing nominal award. In ordering such an award, the court of appeals therefore exceeded its authority by engaging in its own fact-finding and reweighing of known facts. Consistent with the actions of other courts of appeals in similar circumstances, the court should have remanded this case for further proceedings to determine the likely effect of Rambo's injury on his future earnings. See *LaFaille*, 884 F.2d at 62 (leaving to the ALJ the Section 8(h) determination of the appropriateness of a nominal award); *Randall*, 725 F.2d at 799, 800 (determination regarding the propriety of a nominal award is properly left to the ALJ,

who must make explicit findings on all relevant statutory factors).[14]

This Court should therefore reverse the judgment of the court of appeals and remand the case, with instructions that the case be further remanded to the Benefits Review Board to consider the propriety of a continuing nominal award. If the Board concludes that a hearing is necessary, it may further remand the matter to an ALJ. Because Metropolitan bears the burden of proof on the issue, see page 23, *supra*, a continuing nominal award will be appropriate unless Metropolitan demonstrates, by a preponderance of the evidence, that Rambo's injury will not cause a loss of earnings at any time in the future.

---

[14] The ALJ was not asked to consider, and did not determine, whether a continuing nominal award would be appropriate. He therefore made no findings concerning the likelihood that Rambo's physical injury would again result in economic disability in the event that he is unable (for whatever reason) to keep his current employment. As noted above, see note 2, *supra*, the court of appeals concluded that it could consider the propriety of a nominal award even though Rambo had not specifically requested such an award from either the ALJ or the Benefits Review Board. The petition for a writ of certiorari does not challenge that aspect of the court's decision. We therefore believe that any waiver argument that Metropolitan might have asserted has itself been waived.

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the court of appeals with instructions that it be further remanded to the Benefits Review Board for further proceedings regarding the appropriateness of a continuing nominal award.

Respectfully submitted.

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JANUARY 1997

APPENDIX

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
211 MAIN STREET, SUITE 600
SAN FRANCISCO, CALIFORNIA 94105

CASE NO. 83-LHC-242

OWCP NO. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge

DECISION AND ORDER— AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section

references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.25 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 30, 1981. That the date of November 16, 1981, is the appropriate date for the commence-

ment of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by

the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions—§908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ JAMES J. BUTLER
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm

No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT RAMBO'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is a nominal continuing award an appropriate mechanism under the Longshore and Harbor Workers' Compensation Act to incorporate the possible future effects of a medical disability where an injured employee's actual earnings do not fairly and reasonably represent the employee's wage-earning capacity?

2. If a nominal continuing award is authorized by the Act, was the decision of the Court of Appeals in this case to remand for entry of such an award within its statutory authority?

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S. Rep. No. 1988, 75th Cong. 3d Sess. 5-6 (1938) ..7, 18

STATUTORY PROVISIONS INVOLVED

Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

> (h) The wage earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 21(c) of the LHWCA states in pertinent part:

> (c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the Circuit in which the injury occurred, by filing . . . a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside,

> in whole or in part, the order of the board and enforcing same to the extent that such order is affirmed or modified. . . .
>
> 33 U.S.C. 921(c).

STATEMENT

The Respondent, John Rambo, ("Rambo") a longshoreman, injured his back and leg within the course and scope of his employment on September 9, 1980, while employed by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Rambo filed a claim with the United States Department of Labor and trial was set before an Administrative Law Judge ("ALJ") in 1983. At the trial the parties stipulated among other things:

> "That the employee sustained an over-all current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $102.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability."

On November 28, 1983 the ALJ issued a Decision and Order awarding benefits to Rambo at the rate of $80.16 per week for permanent partial disability.

On October 30, 1989, Metropolitan filed with the Department of Labor an "Employer's Application For Modification, Section 922."

A Formal Hearing on the Modification was convened on October 15, 1990 by the ALJ.

At the outset of the proceeding Claimant moved to dismiss on the grounds that the Petition was unsupported by evidence of a change in Rambo's physical condition. In reliance on existing case law and this Motion, Rambo presented no evidence. In support of its Petition Metropolitan offered only Rambo's post injury earnings. Metropolitan called Rambo as the only witness.

Rambo's testimony was uncontroverted that his physical condition had not changed since the Stipulated Award issued in 1983; and, that his permanent partial disability reduced his ability to perform his pre-injury work. Rambo also testified that he was presently employed as a longshore crane operator, was earning more than he had before his injury and that he did not know how long the crane job would last.

The ALJ ruled that Rambo's new job was a "change in conditions" that supported modification and terminated Rambo's benefits. The Benefits Review Board ("BRB") affirmed. Rambo appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals reversed the BRB in the belief that the "change in conditions" requirement for an award modification under Section 922 required proof that Rambo had undergone a change in his physical condition.

This Court reversed, holding "that a disability award may be modified under Section 22 . . . without any change in the employee's physical condition." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. at 2150. This Court then remanded the case "(b)ecause Rambo raised other arguments before the Ninth Circuit that the panel

did not have the opportunity to address." *Id.* Emphasis added.

The two issues raised by Rambo and not decided were:

> (1) Should the employer be estopped from filing a 33 U.S.C. Section 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> (2) Given the 1983 Stipulated Decision and Order of Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

The Court of Appeals reviewed the entire record. In a split decision, the Court held that Metropolitan could seek modification of the prior award of permanent partial disability benefits because, " . . . reliance on Metropolitan to Rambo's detriment" was not established by the record.

In a unanimous decision the Court of Appeals stated that the propriety of a nominal award was properly before it on appeal. The Court cited *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985).

The Court next addressed the propriety of a nominal award in a modification proceeding and stated that the issue had not been determined by the Ninth Circuit. The Court stated, "The Second, Fifth and District of Columbia Circuits have ruled that nominal awards may be used to

preserve a possible future award where there is a significant physical impairment without present loss of earnings." *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d 840, 843 (9th Cir. 1996).[1]

The Court reviewed 33 U.S.C. 922 and noted that it provides that compensation cases may be reviewed and a new compensation order issued which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or the rejection of the claim.

In reviewing 33 U.S.C. Section 908(h), the Court emphasized the statutory language that, " . . . The deputy Commissioner may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844.

---

[1] In Randall v. Comfort Control, Inc., 725 F.2d 791 (D.C. Cir. 1984) the District of Columbia Court of Appeals exhaustively analyzed the interrelationship between Section 922 and Section 908(h), and authorized a nominal award.

In LaFaille v. B.R.B., 864 F.2d 54 (2nd Cir. 1989) the Director, OWCP, argued to the Court that Section 908(h) permitted de minimus awards and the court agreed.

In Hole v. Miami Shipyards, 640 F.2d 769 (5th Cir. 1981), the Court reviewed both Section 922 and Section 908(h) and held that the statutory scheme permitted de minimus awards.

The Court noted that, "This section (908(h)) 'allows the (ALJ) to consider the future effect of a disability'." (citing *Todd Shipyards v. Allan*, 66 F.2d 399 (9th Cir. 1982), cert denied, 459 U.S. 1034, 103 S. Ct. 444, 74 L. Ed. 2d 600, Citing *Hole v. Miami Shipyard Corp.*, 640 F.2d at 772.) *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844.

After reviewing all of the evidence the Court HELD that:

> "Looking at the evidence as a whole, the ALJ's Decision to terminate Rambo's benefits is NOT supported by substantial evidence and the BRB erred in affirming the ALJ's Order". *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844. (Emphasis added).

Finally, the Ninth Circuit Court of Appeals:

1. Concluded quoting the ALJ in *Hole v. Miami Shipyards Corp.*, 640 F.2d at 773 (5th Cir. 1981), that, " . . . a small award fashioned expressly for the purpose of preserving (Rambo's) right to receive compensation should disability in an economic sense ever visit him." was appropriate in this case; and,

2. Remanded for entry of a nominal award.

SUMMARY OF ARGUMENT

In order to determine whether or not an injured employee suffers a permanent partial disability under Section 8(c)(21) of the Longshore Act, it is first necessary to determine the post-injury wage-earning capacity of

that employee. Section 22 of the Act concerns the subject of Modifications of Awards and its language makes no reference to and offers no guidance whatsoever in the determination of wage-earning capacity. By contrast, Section 8(h) of the Act deals exclusively with the determination of wage-earning capacity. The legislative history demonstrates that Congress enacted Section 8(h) to " . . . clarify the interpretation to be placed upon the words 'wage-earning capacity' used in the Act in connection with partial-disability cases . . . " because of " . . . wasteful litigation . . . " regarding " . . . the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury." H.R. Rep. No. 1945, 75th Cong. 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong. 3d Sess. 5-6 (1938). The broad language of Section 8(h) clearly displays Congress' intent that the potential *future* effects of an employee's *injury*, along with any other factors or circumstances which may affect the capacity to earn wages, be considered in this determination if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity. The one-year time limitation on *modification* requests contained in Section 22 is *irrelevant* to this determination except insofar as the potentially harsh effect of this limitations period prompted Congress to specifically include "forward looking" language in Section 8(h).

Contrary to Petitioner's assertions, benefit awards based upon the possibility of future economic harm after consideration of all relevant factors (medical and other) are appropriate under the Act and authorized by the language of Congress in Section 8(h) precisely *because*

such awards prevent the triggering of the one-year limitations period. A continuing nominal award is, in fact, perfectly suited to incorporate possible future economic effects of an injury in furtherance of the goals of Section 8(h) and to allow for modification as conditions change as envisioned by Section 922.

In this case the Court of Appeals properly conducted an independent review of the entire record to determine if the decision of the ALJ was supported by substantial evidence. It concluded that there was not substantial evidence to support complete termination of the claimant's benefits based upon this review. The Court cited to a number of facts contained in the record including the uncontroverted evidence that Rambo's permanent partial disability reduced his ability to perform his pre-injury work, that Rambo's physical condition remains unchanged, and that he didn't know how long his current higher paying job would last. Given these facts, the Court of Appeals concluded that a nominal continuing award was appropriate, especially in a modification proceeding such as Rambo's where the claimant has already been given an award based on a finding of permanent partial disability. The decision of the Court of Appeals in this case epitomizes the type of forward looking award authorized by Section 8(h). Despite the Director's claim to the contrary, the decision to remand for entry of a nominal continuing award was also well within the authority of the Court of Appeals. Congress expressly conferred upon the Circuit Courts the " . . . power to give a decree affirming, modifying, or setting aside, in whole or in part . . . " the orders which they are bound to review and the power of " . . . enforcing same to the extent that such

order is affirmed or modified . . . " Therefore, the decision of the Court of Appeals to remand for entry of a nominal continuing award was soundly within its statutory authority. (33 U.S.C. 921(c)).

ARGUMENT

A. WHERE THE ACTUAL, POST-INJURY EARNINGS OF AN INJURED EMPLOYEE DO NOT FAIRLY AND REASONABLY REPRESENT THE EMPLOYEE'S WAGE-EARNING CAPACITY, A CONTINUING NOMINAL AWARD IS A REASONABLE AND JUST MECHANISM TO FIX THE WAGE-EARNING CAPACITY OF THE EMPLOYEE WITH DUE REGARD FOR THE FACTORS SET FORTH BY CONGRESS IN 33 U.S.C. 908(h).

In enacting 33 U.S.C. 908(h), Congress recognized that actual post-injury earnings may not always fairly and reasonably represent the wage-earning capacity of an injured employee. In such cases, 33 U.S.C. 908(h) clearly expresses the intent of Congress that wage-earning capacity may be fixed or set by considering factors such as the nature of the injury, the degree of physical impairment, the usual employment of the employee, and any other factors which may affect the capacity to earn wages by the injured worker in his or her disabled condition, including the effect of disability as it may naturally extend into the future. Realizing that consideration of these types of factors could never yield a precise, mathematical calculation of wage-earning capacity, Congress further instructed that the wage-earning capacity may be

set "in the interest of justice" and "as shall be reasonable." 33 U.S.C. 908(h). The broad language of Section 908(h) plainly creates a liberal and benevolent approach which may be used for setting the wage-earning capacity of an injured employee.

Thus, although disability under the LHWCA may be, " . . . in essence an economic, not a medical concept . . . " (*Metropolitan Stevedore Co. v. Rambo*, 1155 S. Ct. 2144, 2147 (1995), in cases where the actual post-injury earnings do not fairly and reasonably represent wage-earning capacity, Congress intended that medical factors such as current and anticipated future physical impairment may be used as a guide to approximate wage-earning capacity over a claimant's lifetime. This is obviously no easy task. As the District of Columbia Court of Appeals stated:

> " . . . we recognize the onerous burden placed on the ALJ by the Act. The Act requires omniscience. The ALJ must divine whether the claimant will suffer any injury-related reduction in wage-earning capacity at any time during his lifetime. Often, as in this case, the ALJ will be asked to make this determination at a time when the existence and degree of any reduction in earning capacity is not evidenced by a tangible reduction in current wages paid."

Randall v. Comfort Control, Inc., 725 F.2d 791, 799 (D.C. Cir. 1984).

In grappling with this "onerous burden", every Circuit Court that has considered this issue has approved the use of nominal or de minimis continuing awards. In the cases of *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981) and *Randall v. Comfort Control, Inc.*, supra,

the claimants suffered a serious medical disability but had actual post-injury earnings which were higher than their pre-injury earnings. In *Randall*, supra, the ALJ terminated benefits and the Benefits Review Board affirmed this decision. The District of Columbia Court of Appeals reversed, finding that the ALJ's decision to terminate was not supported by substantial evidence on the record as a whole because the ALJ's opinion focused almost entirely on the fact that the claimant had higher post-injury wages and because the ALJ did not make explicit findings on all relevant aspects of the wage-earning capacity determination or respond to uncontroverted evidence submitted by the claimant. The Circuit Court then indicated that it adopted the approach of the Fifth Circuit in *Hole v. Miami Shipyards Corp.*, supra, and stated:

> "When it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable, the beneficent purposes of the Act, and the mandate that due concern be given to 'the effect of disability as it may naturally extend into the future', 33 U.S.C. Sec. 908(h), are furthered by granting a 'small award, fashioned expressly for the purpose of preserving a claimant's right to receive compensation should disability in an economic sense ever visit him'."

Randall v. Comfort Control, Inc., supra, 725 F.2d at 800 (D.C. Cir. 1984) (citing *Hole v. Miami Shipyards Corp.*, supra, 640 F.2d at 773).

Contrary to Petitioner's assertions, a continuing nominal award is not a fiction and does not award the claimant compensation to which he is not entitled. Where actual earnings do not fairly and reasonably represent wage-earning capacity, Congress has stated that the method used to determine wage-earning capacity may take into account the nature of the injury and the degree of physical impairment including the effect of disability as it may naturally extend into the future. If it is determined that the nature of the injury and degree of physical impairment have produced a serious *medical* disability and that this medical condition may naturally tend to degenerate or worsen over the course of a claimant's lifetime so that there is a significant possibility of future economic harm, a continuing nominal award is the only reasonable mechanism available to comply with the "forward looking" mandate of Section 908(h). Such an award is *not* a fiction but rather an educated assumption of future economic disability based upon known medical facts. Thus, a nominal award is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has already been given an award for loss of wage earning capacity based upon a medically established permanent partial disability.

Rambo v. Director, OWCP, 81 F.3d 840, 844 (9th Cir. 1996).

B. A CONTINUING NOMINAL AWARD IS CONSISTENT WITH THE INTENT OF CONGRESS AS EXPRESSED IN THE LANGUAGE AND LEGISLATIVE HISTORY OF THE LHWCA AND IS NOT IN CONFLICT WITH THE LIMITATIONS PERIOD OF 33 U.S.C. 922.

Petitioner attempts to convince this Court that any reading of Section 908(h) which allows a continuing nominal award "wrecks the statutory scheme" and conflicts with other specific sections of the Longshore Act. In fact, the language of Section 908(h) easily allows (and perhaps encourages) continuing nominal awards in appropriate cases and such a reading does not conflict with the language of the other sections cited by Petitioner. As this Court has repeatedly stated, " . . . When a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct 2144, 2146 (1995) (Citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 190, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991)). Section 908(h) is quite articulate regarding the issue of wage-earning capacity in cases where the injured employee's actual earnings are not fairly and reasonably representative. It coherently expresses Congress' intent that a "forward looking" perspective be used in the determination of wage-earning capacity in such a case. In addition, the legislative history demonstrates that a reading of Section 908(h) which allows continuing nominal awards is perfectly consistent with the comprehensive scheme of the Longshore Act. Finally, if there is any doubt as to the clarity of the

statutory provisions in issue, the Director, OWCP, has argued that continuing nominal awards are consistent with the provisions of the Act and this interpretation is entitled to deference.

As set forth above, the broad language of Section 908(h) allows the deputy commissioner (or an ALJ in disputed cases) to fix or set the wage-earning capacity of an injured employee "in the interest of justice" and "as shall be reasonable" with due regard to medical factors such as the nature of injury, the degree of physical impairment and the effect of disability as it may naturally extend into the future. To further emphasize the broad discretion conferred by Section 908(h), Congress stated therein that consideration could be given to " . . . any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition." 33 U.S.C. 908(h). Congress did *not* add any proviso, limitations or qualifications to this language. It did not state that the determination of wage-earning capacity (and therefore any award of benefits) must be based upon any sort of formula or mathematical calculation. Even Petitioner must admit that this language allows for a continuing award of *any* dollar amount after consideration of the proper factors so long as it is "reasonable." Once this analytical threshold has been crossed, Petitioner's argument is reduced to the assertion that a nominal award is somehow unreasonable because it is not a particular dollar amount. Although the legislative history will be reviewed below to demonstrate that Congress did not consider such awards to be unreasonable, the Fifth Circuit Court of Appeals provided perhaps the most telling response to such an argument when it stated:

> " . . . we believe that a small award, fashioned expressly for the purpose of preserving Claimant's right to receive compensation should disability in its economic sense ever visit him, seems far less arbitrary than picking a 'disability' figure out of thin air." *Hole v. Miami Shipyards*, 640 F.2d 769, 773 (5th Cir. 1981) (citations omitted).

Petitioner's cursory attempt to create conflicts between this reading of Section 908(h) and other sections of the Act must likewise fail. Without setting forth the actual text of the sections involved, Petitioner impliedly argues that any reading of Section 908(h) which would allow continuing nominal awards conflicts in some unspecified way with 33 U.S.C. 902(10) and 33 U.S.C. 908(c)(21). (Petitioner's Brief on the Merits, p. 15). In fact, 33 U.S.C. 902(10) states:

> "Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Importantly, the text of Section 902(10) does *not* further define what factors should be used to determine if an employee in fact has an "incapacity" to earn wages or whether the determination should be made only with regard to present wages or the anticipated future wages of the employee. This is because Congress left the further definition of wage earning capacity (and by inference "incapacity") to Section 908(h). Clearly, by the language of Section 908(h), Congress intended the definition of "incapacity" to earn wages to include *future* incapacity as well as present.

The text of 33 U.S.C. 908(c)(21) states:

> "In all other cases in this class of disability,[2] the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise payable during the continuance of such partial disability. . . . "

Once again this section does not state what factors should be used to define the terms "wage earning capacity" or "during the continuance of partial disability". Once again, Congress further elucidated these terms in the later Section 908(h) – specifically authorizing the consideration of future effects of injury or disability in the determination of wage-earning capacity. In this light, "partial disability" obviously continues (despite the fact that actual earnings may currently be the same or higher than pre-injury earnings) if there is a significant possibility that the nature of the injury or degree of physical impairment will cause future economic loss. Although Petitioner takes pains to distinguish between the terms "injury" and "disability", Petitioner, perhaps somewhat disingenuously, fails to recognize that Congress has stated that actual post-injury wages are not always equivalent to wage-earning capacity. According to Petitioner's reading of the Act, partial disability and incapacity to earn wages automatically ends whenever an employee's actual earnings meet or exceed pre-injury earnings. Petitioner's arguments regarding the inappropriateness of

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[2] By using the term "in this class of disability" Congress was referring to unscheduled injuries such as Rambo's back injury.

nominal continuing awards must fail because they ignore completely the "forward looking" language of Congress in Section 908(h).

The legislative history of the Longshore Act provides further support that such awards are consistent with the comprehensive scheme of the Act. In fact, the pertinent committee reports clearly show that Congress amended the Act in 1938 to add Section 908(h) precisely because it was concerned that the beneficent purpose of the Act might be defeated by the one-year limitation period for modification if the future effects of an industrial injury were not taken into consideration. The Congressional Report states that Section 908(h):

> " . . . provides for consideration of the effects of an injury causing permanent partial disability, upon the employees ***future ability to earn***. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful employment definitely limited. . . . It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present, the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity, but also the future consequences of such disability on the

employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, *notwithstanding impairment of physical condition and probable impairment of future wage-earning capacity* an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the **limitations in the act** with respect to the filing of claim for compensation and right of review of the case **(§ 22)** had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus ***defeat the beneficent provisions of the Longshoremen's Act.***"

H.R. Rep. No. 1945, 75th Cong. 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong. 3d Sess. 5-6 (1938). (Emphasis added).

Congress obviously perceived that Section 922's one-year time limitation on modification could work an injustice in cases where actual post-injury earnings do not fairly and reasonably represent an injured worker's wage-earning capacity. Thus, while Congress chose not to generally discard Section 922's time limitation it amended the Act and added Section 908(h) to mitigate its effect and to allow for the consideration of the future effects of

injury in appropriate cases. Contrary to Petitioner's assertions, therefore, where the nature of the injury, degree of physical impairment, or possible future effects of an injury so warrant, a nominal continuing award (which allows for modification as future events unfold) is *NOT* in conflict with Section 922 and is fully consistent with the intent of Congress. Petitioner mis-characterizes the situation when it states, "To Rambo, the Director, and the Ninth Circuit, Section 8(h) is a wild card which may be played to trump Section 22's time limitation whenever a court believes it appropriate to extend a claimant's right to modification indefinitely." (Petitioner's Brief on the Merits, p. 15). There is no inherent inconsistency in the two sections. The legislative history shows that Congress *itself* intended Section 908(h) to modify the method of determining wage-earning capacity to account for the anticipated future effects of injury and thereby prevent the injustice that would otherwise result if the award was based solely on actual earnings and modification was time barred after one year due to Section 922.

In proposed amendments to the Act in 1983 and 1984 the Committee on Labor and Human Resources recommended a new approach which would have eliminated both the one-year time limitation on requests for modification of Section 22 and the phrase "as it may naturally extend into the future" from Section 908(h). The resulting statutory framework would have eliminated a need for continuing awards running into the future because the one-year limitations period would be eliminated. The language in Report No. 98-81 (May 10, 1983) at Pg. 37 makes it clear that Congress was aware of the fact that

nominal continuing awards had been used by ALJ's for some time:

> " . . . This Amendment promotes equity permitting all parties to apply for modification of awards at any time after an award is entered. The one-year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by the Act. As a consequence, Administrative Law Judges felt compelled to award benefits for wage loss at the rate of **one percent** in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The new approach is far more realistic, allowing claimants for example, to apply for increased benefit for wage loss or for greater physical disability at a time when full effects of an injury may manifest themselves. Requests for modification will no longer be necessary simply to keep the statute of limitation from running."

The Committee on Labor and Human Resources Report No. 98-81 (May 10, 1983) p. 37.

Petitioner states that Rambo and the Director ignore " . . . the fact that the legislative history offers no clue about Congress' reasons for rejecting the proposed repeal of both provisions and the fact that the proposals themselves resulted from a perception that nominal wards were a problem . . . " (Petitioner's Brief on the Merits, p. 15). It is respectfully asserted that Petitioner is incorrect on both counts. It is Petitioner who ignores the logical inferences from the language of the Committee's Report and the inaction of Congress. From that language it is

quite apparent that Congress knew of the fact that nominal continuing awards were being issued by ALJs as a consequence of the one-year time limitation in Section 22. If Congress considered nominal awards to be a problem why then didn't it make some amendments or changes to the existing statutory framework forbidding such awards – if not in 1983 then sometime in the thirteen years that followed? Obviously, Congress did *not* perceive such awards as a problem and did not want to encourage the yearly filing of requests for modification " . . . simply to keep the statute of limitation from running . . . " that would inevitably follow if nominal awards were eliminated. *Id.*

Finally, the Director, OWCP, has consistently argued that continuing nominal awards are proper under the Longshore Act. (See *LaFaille v. B.R.B.*, 884 F.2d at 62 (2nd Cir. 1989); Brief for the Director, Office of Workers' Compensation Programs, p. 16). The Director, OWCP, through a delegation of powers from the Secretary of Labor, is the Administering Agency for the LHWCA. As such, the Director's interpretation of the Act is entitled to deference under the principles announced in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

C. IN THIS CASE THE COURT OF APPEALS PROPERLY CONDUCTED AN INDEPENDENT REVIEW OF THE RECORD TO DETERMINE IF THE ALJ'S DECISION TO TERMINATE BENEFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In performing its review function the Court of Appeals is required to ". . . conduct an independent review of the record to determine if the ALJ'S findings are supported by substantial evidence." *Stevenson v. Linens of the Week*, 688 F.2d 93, 97 (D.C. Cir. 1982). See also *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 290 (3d Cir. 1982); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n. 1 (5th Cir. 1980). After conducting this independent review of the record the Court of Appeals in this case stated:

> "In ruling that Rambo no longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings. Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence and the BRB erred in affirming the ALJ's order."

Rambo v. Director, Office of Workers' Compensation Programs, 81 F.3d 840, 844 (9th Cir. 1996). In support of its finding that the ALJ's decision to terminate benefits was not supported by substantial evidence, the Court of Appeals set forth important evidentiary facts from the record:

> "Here the evidence is uncontroverted that Rambo's permanent partial disability reduced his ability to perform his pre-injury work. This wage-earning capacity loss was sufficient to support a weekly benefits award. Rambo's physical condition remains unchanged."

Id. 81 F.3d at 844.

Contrary to Petitioner's assertions, Rambo and the Court of Appeals can and do seriously argue that the ALJ's determination that Rambo no longer has a wage earning capacity loss is unsupported by substantial evidence. Once again, Petitioner mistakes actual earnings for wage-earning capacity and attempts to convince this Court that because Rambo's earnings are higher than before his injury this means that his right to recover benefits in the future should automatically be terminated. This simply is not consistent with the "forward looking" perspective and language of Section 908(h).

Further, the ALJ's decision to terminate benefits cannot be adequately defended on the assumption that he simply determined that Rambo's actual post-injury wages *do* reasonably and fairly represent his wage-earning capacity. First, nowhere in his opinion does the ALJ make this statement. Second, the Benefits Review Board has held that the same "forward looking" factors which must be considered in setting the wage-earning capacity of a worker whose actual earnings do not fairly and reasonably represent his wage-earning capacity must also be considered in the initial determination of whether or not the actual earnings are representative. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660-661 (1979). This holding by the Benefits Review Board Service was based upon Section 8(b) of The Administrative Procedure Act, 5

U.S.C. 557(c) which requires an ALJ to make explicit findings on all relevant aspects of a determination.

In the case at bar the ALJ failed to consider or make explicit findings concerning the effect that the nature of Rambo's injury, the degree of his physical impairment, or his reduced ability to perform his pre-injury work might have on Rambo's *future* capacity to earn wages. The ALJ's decision contains no real explanation or analysis of what the evidence demonstrated regarding the rate of inflation or the salary increases for longshore workers during the period in question.[3] The ALJ simply states that he took these factors ". . . into consideration . . . " (J.A. 55). For this reason, the Ninth Circuit correctly determined that the decision of the ALJ to completely terminate benefits was not supported by substantial evidence.

D. THE DECISION OF THE COURT OF APPEALS TO REMAND FOR ENTRY OF A NOMINAL AWARD WAS A PROPER EXERCISE OF ITS AUTHORITY PURSUANT TO 33 U.S.C. 921(c).

Section 21(c) of the LHWCA states in pertinent part:

> "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the **United States Court of Appeals** for the Circuit in which the injury occurred, by filing . . . a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have **jurisdiction** of the proceeding and **SHALL HAVE THE POWER TO GIVE A DECREE AFFIRMING, MODIFYING, OR SETTING ASIDE, IN WHOLE OR IN PART, THE ORDER OF THE BOARD AND ENFORCING SAME TO THE EXTENT THAT SUCH ORDER IS AFFIRMED OR MODIFIED . . . "** 33 U.S.C. 921(C) (Emphasis added).

The District of Columbia Court of Appeals has characterized Section 21(c) as vesting "broad authority" in the Courts of Appeals. *Burns v. Director, OWCP*, 41 F.3d 1555, 1564-1565 (1994).

The language of Section 21(c) allows an Appellate Court to modify orders in whole or in part and to enforce its decision " . . . to the extent that such order is affirmed or modified."

In this case the Court of Appeals simply modified the order to terminate benefits by granting a nominal award and enforced this modification by remanding for entry of that nominal award. Therefore, the decision was squarely within the jurisdiction and authority granted to the Court of Appeal by Congress in Section 921(c).

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The language of Section 8(h) clearly expresses the intent of Congress that the future effects of industrial injuries should be taken into consideration when determining wage-earning capacity and issuing an award. The one-year time limitation of Section 22 is inapplicable to

[3] In fact, the transcript of the Modification Hearing demonstrates that the ALJ sustained the objection of Rambo's counsel to evidence submitted by Metropolitan in the form of testimony in a prior, unrelated case regarding the yearly basic longshore pay increases. (J.A. 22-23).

the determination of wage-earning capacity and is in no way inconsistent with a continuing award of any size. A continuing nominal award is the best method yet devised to satisfy the important goals of both Section 8(h) and Section 22. The legislative history establishes that Congress intended the "forward-looking" perspective of Section 908(h) to mitigate the potentially harsh effects of the limitations period of Section 22 and that, at least as early as 1983, Congress was aware of the practice of ALJs issuing nominal continuing awards. Congress chose *not* to amend the Act to forbid such awards and this Court should likewise resist Petitioner's invitation to do so.

Respectfully submitted,

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No. 96-272

In the Supreme Court of the United States

OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY, PETITIONER

v.

JOHN RAMBO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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As we explain in our opening brief, the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) authorizes a continuing nominal award to a claimant who has suffered a reduction in long-term wage-earning capacity but who has no present loss of earnings. The court of appeals in this case erred, however, in ordering such an award without further administrative proceedings.

Our position in this case is not fully consistent with that taken by either of the private parties to the dispute. Petitioner Metropolitan Stevedore Company, supported by amici National Steel and Shipbuilding Company (NASSCO) and National Association of

Waterfront Employers, et al. (NAWE), argues that continuing nominal awards violate the express terms of the Longshore Act. See Pet. Br. 8-19; NASSCO Br. 4-10; NAWE Br. 9-10. Respondent John Rambo contends (Resp. Br. 22-25) that the court of appeals acted within its statutory authority in modifying his termination order by granting a continuing nominal award. We respond to each of those points in turn.

A. 1. Metropolitan and its amici assert that a continuing nominal award is inconsistent with the Longshore Act's distinction between "injury" and "disability," nullifies Section 8(c)(21)'s limitation of compensation to "the continuance of partial disability," and subverts Section 22's one-year limitations period for modification requests. See 33 U.S.C. 902(2), 902(10), 908(c)(21), 922. Those contentions are directed, in substantial measure, at an argument we do not make. Thus, we do *not* contend that a continuing nominal award may appropriately be given to a claimant who fails to demonstrate a "disability," which is defined by the Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Where a claimant fails to satisfy that statutory prerequisite for an award of benefits, we agree with Metropolitan and its amici that a desire to prevent the triggering of Section 22's limitations period cannot justify entry of a nominal award.

We disagree, however, with Metropolitan's contention (Pet. Br. 14) that a Longshore Act claimant must demonstrate *current* economic harm in order to establish a "disability" within the meaning of the Act. Section 8(h) of the Act expressly authorizes the district director or administrative law judge (ALJ) to consider "the effect of disability as it may naturally

extend into the future" in determining a claimant's "wage-earning capacity." 33 U.S.C. 908(h).[1] As we explain in our opening brief (Gov't Br. 17-23), a claimant who proves that he will more likely than not suffer a future loss of earnings as a result of a covered injury has established a "disability," and consequent entitlement to benefits, even if his current earnings have not declined.[2]

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[1] All of the courts of appeals that have found continuing nominal awards to be appropriate under certain circumstances have based their conclusions on the language of Section 8(h), not on the premise that a claimant who fails to demonstrate a "disability" within the meaning of the Act may nevertheless receive an award. See *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772-773 (5th Cir. 1981); *Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 800 (D.C. Cir. 1984); *LaFaille* v. *Benefits Review Bd.*, 884 F.2d 54, 62 (2d Cir. 1989); Pet. App. 11a-13a. Cf. *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1234 n.9 (4th Cir. 1985) (finding that continuing nominal awards "may be appropriate in some cases" and basing the authority for such awards on Section 8(h)).

[2] Section 8(h) provides for a two-step analysis in the determination of a Longshore Act claimant's wage-earning capacity. First, the district director or ALJ must determine whether the claimant's actual earnings "fairly and reasonably represent his wage-earning capacity." 33 U.S.C. 908(h). If actual earnings do not fairly and reasonably reflect wage-earning capacity, the district director or ALJ may then, "in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard" for various enumerated factors, "including the effect of disability as it may naturally extend into the future." *Ibid.*

Metropolitan suggests (Pet. Br. 9) that consideration of anticipated future economic effects is appropriate only after the district director or ALJ has determined, on some other basis, that the claimant's current earnings do not fairly and reasonably reflect his wage-earning capacity. As we explain in our opening brief (Gov't Br. 17-18), that suggestion is incorrect.

A continuing nominal award based on such a showing does not "violate[] the LHWCA's clear distinction between 'injury' and 'disability.'" Pet. Br. 8. Under the standard we advocate, a claimant must show not only that he has suffered a physical impairment, but also that he is more likely than not to suffer future economic loss from a covered injury, in order to receive a continuing nominal award. Although "physical impairment alone does not suffice" to establish an entitlement to benefits (Pet. Br. 14), a claimant need not prove a *current* loss of earnings.[3] Such a requirement is unnecessary to preserve the Longshore Act's distinction between "injury" and "disability," and it is contrary to Section 8(h)'s express authorization to consider the likely *future* effects of a claimant's injury.

Contrary to Metropolitan's contention (see Pet. Br. 8-9), a continuing nominal award based on a likelihood of future economic injury is consistent with Section 8(c)(21)'s provision that partial disability benefits will be payable "during the continuance of partial dis-

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Rather, a claimant's likely future earnings must be considered both in determining whether his actual earnings fairly and reasonably represent his wage-earning capacity and, if they do not, in "fix[ing] such wage-earning capacity as shall be reasonable." 33 U.S.C. 908(h). See *Randall*, 725 F.2d at 796-797; *Devillier* v. *NASSCO*, 10 Ben. Rev. Bd. Serv. (MB) 649, 660-661 (1979). That approach is essential if the term "wage-earning capacity" is to be given a consistent meaning throughout Section 8(h). See Gov't Br. 17-18.

[3] A claimant may demonstrate, for example, that his future earnings are likely to decline because his ability to compete in the open labor market has been impaired. For other examples of situations in which future economic loss may be likely even when the claimant suffers no current economic injury, see Gov't Br. 19.

ability." 33 U.S.C. 908(c)(21). As we explain above and in our opening brief, a claimant who demonstrates a likelihood of future economic loss caused by a covered injury has established a "disability" within the meaning of the Act. That disability continues for so long as the likelihood of future economic loss persists. The employer is free to seek modification of the award, however, by proving that conditions (whether physical or otherwise) have changed such that the claimant is no longer disabled—*i.e.*, that the claimant will, more likely than not, suffer no future economic loss as a result of his injury. See Gov't Br. 23; 33 U.S.C. 922.[4] Our approach therefore does not suggest

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[4] Metropolitan's amici assert that the claimant bears the burden of persuasion in a continuing nominal award proceeding. See NAWE Br. 8; NASSCO Br. 13 n.3. We agree with that proposition with respect to an initial award. Although Rambo had that burden under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), as the proponent of the proposed order awarding benefits in the initial claim proceeding, he carried that burden by establishing that his injury had resulted in a loss of wage-earning capacity. As we observe in our opening brief (Gov't Br. 23), the burden of persuasion has now shifted to Metropolitan, the proponent of the proposed order terminating Rambo's benefits.

We agree that Metropolitan is not required to disprove any possibility of future economic injury. See Pet. Br. 10, 14. As this Court made clear in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 277-278, 281 (1994), disability determinations under the Longshore Act are governed by a preponderance of the evidence standard. To insist that all doubts regarding the prospect of future economic injury be resolved in the claimant's favor would indeed be inconsistent with that standard. Metropolitan is therefore entitled to an order terminating Rambo's benefits if it proves that Rambo will, more likely than not, suffer no future loss of earnings as a result of his injury. See Gov't Br. 23. Nothing in *Greenwich*

that a claimant retains an entitlement to benefits beyond "the continuance of partial disability." 33 U.S.C. 908(c)(21).[5]

2. Metropolitan contends that a rule permitting continuing nominal awards "rewrites" or "override[s]" the one-year limitation on modification requests established by Section 22 of the Act, 33 U.S.C. 922. See Pet. Br. 8, 16. We disagree. Where a continuing nominal award is based on the likelihood of future economic loss, the award is consistent with both the text and purpose of Section 22's modification provisions.

Metropolitan does not appear to argue that a continuing nominal award is contrary to the literal provisions of Section 22. Such a claim would be untenable. Section 22 does not speak to the substantive determination of whether a claim should be granted or denied (or an award terminated) in the first instance. That determination is governed by Section 2(10) (which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"), and by Section 8(h) (which prescribes the approach to be used in determining a claimant's "wage-earning capacity"). If (as we contend) a claimant who proves a likelihood of future economic loss has established a "disability" within the meaning of the Act, nothing in Section 22 can be construed to impose an independent barrier to an award of benefits.

In contending that a nominal award "rewrites" or "override[s]" Section 22, Metropolitan appears to mean only that such an award prevents the triggering of the one-year limitations period that would follow from the outright denial of the claim. But the fact that a continuing nominal award prevents the triggering of the limitations period does not mean that such an award "nullifies" the limitations period (NASSCO Br. 8) or subverts Section 22's effective operation. Although Section 22 requires that modification requests be made within one year after the denial of a claim, that Section also authorizes modification requests "at any time prior to one year after the date of the last payment of compensation." Section 22 thus quite plainly reflects the premise that a claimant who establishes an initial statutory entitlement to benefits should be permitted to obtain an increased award at a later date if the economic consequences of his injury become more severe. See Gov't Br. 24-28. Far from violating Section 22, the approach we advocate furthers the purposes of that provision by ensuring that an injured claimant who establishes a likelihood of future economic harm is not barred from obtaining compensation if and when that harm materializes.[6]

Collieries suggests, however, that the prospect of future economic harm, if proved, provides an insufficient basis for a Longshore Act award.

[5] Contrary to amicus NASSCO's assertion (NASSCO Br. 8), continuing nominal awards do not reflect the premise that a Longshore Act employer "is responsible or liable indefinitely for a LHWCA claimant's continued employment after an industrial injury." Such awards are based not on the prospect of future unemployment as a result of an economic downturn, but on the likelihood that the claimant will be unable to compete for other employment due to the continuing effects of a disabling injury.

[6] Both Metropolitan and NASSCO cite *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952), in support of their contention that continuing nominal awards violate the limitations

B. Contrary to Rambo's contention (Resp. Br. 22-25), the court of appeals exceeded its authority in ordering a continuing nominal award. Rambo asserts that the court of appeals properly conducted an independent review of the record to determine whether the ALJ's decision was supported by substantial evidence. *Id.* at 22. Rambo also contends that the court possessed statutory authority to modify the ALJ's termination order and to enforce the order, as modified, by granting a continuing nominal award. *Id.* at 24-25. Those issues, however, are not in dispute. Rather, the issue here is whether the court of appeals can engage in its own fact-finding and reweighing of facts in support of its decision.

The Benefits Review Board is directed by the Act to give deference to the ALJ's resolution of disputed

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period of Section 22. See Pet. Br. 7-8, 11-12; NASSCO Br. 6-7. *Pillsbury* is inapposite, however, since it involved Section 13(a)'s one-year time limit on initial claims, 33 U.S.C. 913(a), not Section 22's one-year limitation on modification requests. Unlike the limitations period of Section 22, which starts from the "date of the last payment of [an award of] compensation" or "the rejection of a claim," the Section 13(a) time limit construed in *Pillsbury* began with "the injury" of the worker. *Pillsbury*, 342 U.S. at 197 (quoting 33 U.S.C. 913(a)).

Amicus NASSCO also speculates (NASSCO Br. 7) that this Court's endorsement of continuing nominal awards would lead to a substantial increase in Longshore Act litigation. We see no reason to believe, however, that the claimants entitled to nominal awards under our approach—*i.e.*, persons who suffer no current loss of earnings but who are more likely than not to suffer economic harm in the future as a result of a covered injury—will be especially numerous. The requirement that an employee with no present economic loss must demonstrate both a physical impairment and a likely future loss of earnings can be expected to restrict such awards to the most deserving claimants.

factual issues. Thus, "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b)(3). The courts of appeals have consistently recognized that a similarly deferential standard governs judicial review of an ALJ decision that has been affirmed by the Board. See, *e.g.*, *See* v. *Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 380 (4th Cir. 1994) (reviewing court in LHWCA case "must defer to the ALJ's credibility determinations and inferences from the evidence, despite [the court's] perception of other, more reasonable conclusions from the evidence"); *Whitmore* v. *AFIA Worldwide Ins.*, 837 F.2d 513, 515 (D.C. Cir. 1988) (court in Longshore Act case determines "whether the ALJ's findings of fact are supported by substantial evidence on the record taken as a whole"); *Container Stevedoring Co.* v. *Director, OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991) (court of appeals cannot substitute its views for ALJ's views or engage in *de novo* review of the evidence); *Volpe* v. *Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982) (court of appeals cannot make its own findings of fact).

Because it is the function of the ALJ, not the court of appeals, to make appropriate findings of fact, the reviewing court cannot rule on factual issues never presented to or decided by the ALJ. *Volpe*, 671 F.2d at 701; *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 115 (4th Cir. 1982). In particular, it is the role of the ALJ to consider and make explicit findings on all relevant Section 8(h) factors in determining whether the claimant's post-injury earnings accurately reflect his wage-earning capacity, and whether the claimant's injury is likely

to cause a loss of earnings in the future. 5 U.S.C. 557(c); *Randall*, 725 F.2d at 797, 799; *LaFaille*, 884 F.2d at 61.

Rambo contends that "the decision of the ALJ to completely terminate benefits was not supported by substantial evidence" because the ALJ failed adequately to consider the likely effect of Rambo's injury on his "*future* capacity to earn wages." Resp. Br. 24. The court of appeals similarly concluded that the ALJ's decision was not supported by substantial evidence because "the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings." Pet. App. 13a. Those criticisms, however, go not to the existence of substantial evidence in the record, but to the ALJ's articulation of the reasons for his decision. Moreover, any inadequacy in the ALJ's treatment of the relevant issues could not provide a basis for the court to order a continuing nominal award on its own initiative. Rather,

> [i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. *Lorion*, 470 U.S. 729, 744 (1985).

Thus, the ALJ's failure to make explicit findings regarding the likelihood of future economic harm does not support the court of appeals' decision to order a continuing nominal award. Rather, the court should have remanded the case for further administrative proceedings to determine the propriety of such an award. See Gov't Br. 31-33; *Randall*, 725 F.2d at 797-798 (where ALJ fails to make the mandatory Section 8(h) factual findings, the case must be remanded so that those findings can be made); *LaFaille*, 884 F.2d at 61-62.

* * * * *

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed. The case should be remanded to the court of appeals with instructions that it be further remanded to the Benefits Review Board for further proceedings regarding the appropriateness of a continuing nominal award.

Respectfully submitted.

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Acting Solicitor General

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FEBRUARY 1997

(8)

No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL STEEL AND SHIPBUILDING COMPANY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF NATIONAL STEEL AND SHIPBUILDING COMPANY IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, NATIONAL STEEL AND SHIPBUILDING COMPANY ("NASSCO") moves for leave to file the Brief *Amicus Curiae* in support of Petitioner METROPOLITAN STEVEDORE COMPANY ("Petitioner"). Petitioner has consented in writing to NASSCO filing a Brief *Amicus Curiae* on its behalf. A letter of consent is being filed with the Clerk of this Court with NASSCO's Brief *Amicus Curiae*. Respondent JOHN RAMBO ("Respondent" or "Claimant") also has consented in writing to NASSCO's filing a Brief *Amicus Curiae*. A letter of consent is being filed with the Clerk of the Court with NASSCO's Brief *Amicus Curiae*. NASSCO has been unable to obtain consent from Respondent Director, OWCP.

NASSCO is a San Diego based shipbuilding and ship repair company which currently employs in excess of 5,000 employees. Claims by most of those employees for work-related injuries fall within the jurisdiction of the California Workers' Compensation Act, California Labor Code § 3600 *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* ("LHWCA").

NASSCO is self-insured and self-administered for LHWCA benefits. As such, NASSCO has a strong interest in the above-captioned case. The decision of the Court will directly affect the liability of NASSCO, and the manner in which claims of injured NASSCO employees are administered by NASSCO, including the ability of

NASSCO to settle its LHWCA claims. NASSCO and indeed all ship repair and shipbuilding companies that are covered by the LHWCA have a vital stake in the question now before the Court.

Unless the Ninth Circuit is reversed on the question now before the Court, NASSCO will be routinely confronted with LHWCA claims for nominal awards for permanent partial disability by injured employees who have returned to work at wages equal to, or higher than, their pre-injury wages. Therefore, the Ninth Circuit's decision, if left intact, will have a significant economic impact on NASSCO and the ship construction and ship repair industry. Accordingly, *Amicus Curiae* NASSCO respectfully requests leave to file the attached Brief *Amicus Curiae* in support of Petitioner.

DATED: January 10, 1997

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

NASSCO is a San Diego based shipbuilding and ship repair company which currently employs in excess of 5,000 employees. Claims by most of those employees for work-related injuries fall within the jurisdiction of the California Workers' Compensation Act, California Labor Code § 3600 *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* ("LHWCA").

NASSCO is self-insured and self-administered for LHWCA (and California Workers' Compensation Act) benefits. As such, NASSCO has a strong interest in the above-captioned case. The decision of the Supreme Court will directly affect the liability of NASSCO, and the manner in which claims of injured NASSCO employees are administered by NASSCO, including the ability of NASSCO to settle its LHWCA claims. NASSCO and indeed all ship repair and shipbuilding companies that are covered by the LHWCA have a vital stake in the question now before the Court.

The ship repair and ship construction industry is by nature engaged in a cyclical business. Ship repair and ship construction employees typically are hired when contracts are obtained, and then laid off at the completion of the ship repair and ship construction projects. The employees are then rehired when new ship repair or ship construction work is obtained. However, the Ninth Circuit's decision will, in effect, provide LHWCA claimants with the ability to obtain increased LHWCA benefits (i.e., unemployment benefits) during periods of subsequent layoff.

Unless the Ninth Circuit is reversed on the question now before the Court, NASSCO will be routinely confronted with LHWCA claims for nominal awards for permanent partial disability by LHWCA claimants who have returned to work at wages equal to or higher than their pre-injury average weekly wages. The Ninth Circuit decision will also serve as a disincentive to LHWCA claimants who have returned to work to settle claims. That will undoubtedly result in increased costs to the shipyards for administration, litigation and payment for LHWCA claims for nominal awards for permanent partial disability to employees who do not have an economic disability.

In addition, if the Ninth Circuit's decision is affirmed, the amount of reserves maintained for workers' compensation by NASSCO and other self-insured shipyards would have to be increased accordingly. That will, of necessity, be accompanied by a reduction in the amount of funds available for capital improvement and growth. Therefore, the Ninth Circuit's decision, if left intact, will have a significant economic impact on NASSCO in particular and on the ship construction and ship repair industry in general.

II

SUMMARY OF ARGUMENT

In the case before the Court, the Ninth Circuit held in part that a LHWCA claimant is entitled to a nominal or *de minimis* award for permanent partial disability in order to preserve the LHWCA claimant's right to seek modification indefinitely pursuant to Section 22, 33 U.S.C. § 922.

Thus, although Congress enacted LHWCA Section 22 with a one-year statute of limitations, the Ninth Circuit has read out of the LHWCA that statute of limitations under the guise of construction. In so doing, the Ninth Circuit has gone well beyond its authority and attempted to "rewrite Congress's words."

In the case before the Court, the administrative law judge ("ALJ") as the trier of fact found that Claimant had returned to work at wages well in excess of his pre-injury average weekly wage, and therefore had not sustained the economic "disability" required by the LHWCA to support an award for permanent partial disability. However, the Ninth Circuit substituted its own view for that of the ALJ in violation of the court of appeals' standard of review.

The Ninth Circuit also improperly relied on speculation and surmise. Indeed, conjecture that a LHWCA claimant (who is earning higher wages post-injury) may possibly be laid off at some indefinite time in the future, relied upon by the Ninth Circuit, does not constitute substantial evidence in support of a nominal or *de minimis* award for permanent partial disability.

The construction of LHWCA Section 22 by the Ninth Circuit will result in increased litigation and administration costs and interfere with efficient administration of the LHWCA. Although the Ninth Circuit's rationale for its decision, preserving indefinitely a LHWCA claimant's right to seek modification, is a "laudable concern," the LHWCA does not provide for *de minimis* awards in order to preserve the Section 22 statute of limitations. The Ninth Circuit's decision provides for a recovery not

authorized by Congress, and should therefore be reversed.

III

ARGUMENT

A. The Ninth Circuit's Decision Improperly Nullifies the LHWCA Statute Of Limitations.

In *Morrison-Knudsen Construction Company v. Director, OWCP,* 461 U.S. 624, 636, 103 S. Ct. 2045, 2052 (1983), this Court emphasized that the LHWCA is not a simple remedial statute intended for the benefit of workers. Rather, the LHWCA was designed to strike a balance between the concerns of longshore and harbor workers on the one hand, and their employers on the other. *Id.; see Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 951 (3rd Cir. 1990), *cert. denied,* 498 U.S. 1067, 111 S. Ct. 783 (1991) (the LHWCA was specifically drafted to benefit not only employees, but also employers); *cf. Director, OWCP v. Detroit Harbor Terminals,* 850 F. 2d 283, 291 (6th Cir. 1988) ("[with the 1972 Amendments], . . . Congress also made it clear that the rights of employers and insurance carriers would not be ignored").

Consistent with that balance, Congress enacted as part of the LHWCA a one-year statute of limitations for filing initial LHWCA claims, 33 U.S.C. § 913, and also a one-year statute of limitations for filing modification claims. 33 U.S.C. § 922. The statute of limitations manifests the Congressional intent to deny compensation in all cases of disability arising from industrial injury unless

the claim is filed within the prescribed time period, without provision for exception. *Kobilkin v. Pillsbury,* 103 F.2d 667 (9th Cir. 1939), *aff'd,* 309 U.S. 619, 60 S. Ct. 465 (1940).

In the case before the Court, the Ninth Circuit held that a nominal or *de minimis* award for permanent partial disability to a LHWCA claimant is appropriate even when the claimant does not currently manifest an economic disability, the threshold requirement for an unscheduled permanent partial disability award. *See* 33 U.S.C. §§ 902(10), 908(c)(21); *Sproull v. Director, OWCP,* ___ F.3d ___, 30 BRBS 49, 50 (CRT) (9th Cir. 1996) ("permanent partial disability benefits are intended to compensate an injured employee for loss of wage earning capacity, which is calculated by comparing the employee's post-injury 'wage earning capacity' with his pre-injury 'average weekly wages' "). The Ninth Circuit reasoned that such a nominal award is proper in order to "preserve" the claimant's right to future LHWCA benefits in either an initial award determination or a modification proceeding because the claimant "may" at some indefinite time in the future sustain an economic disability.[1] *Rambo v. Director,*

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[1] In so ruling, the Ninth Circuit relied on LHWCA Section 8(h), 33 U.S.C. § 908(h), which allows the ALJ to consider the effects of a disability as it may extend into the future. However, in relying on Section 8(h), the Ninth Circuit ignored the threshold requirements of Section 2(10), 33 U.S.C. § 902(10) and Section 8(c)(21), 33 U.S.C. § 908(c)(21), which initially require a finding that the claimant sustain a "disability" before the effects of that disability as it may extend into the future can be considered. *See Owens v. Traynor,* 274 F. Supp. 770 (D. Md. 1967), *aff'd,* 396 F.2d 783 (4th Cir. 1968), *cert. denied,* 393 U.S. 962, 89 S. Ct. 401 (1968).

OWCP, 81 F.3d 840, 843-844 (9th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S.Ct. 504 (1996).

The Ninth Circuit further reasoned:

> While a nominal award does indefinitely extend the period for modification, it is the only mechanism available to incorporate the possible future effects of a disability in an award determination. Thus, it is an appropriate mechanism, especially in a modification proceeding . . . where the claimant has already been given an award based on finding of permanent partial disability. [81 F.3d at 844.]

However, in so concluding, the Ninth Circuit essentially read the one-year statute of limitations out of Section 22. In *Pillsbury v. United Engineering Company*, 342 U.S. 197, 200, 72 S. Ct. 223, 225 (1952), this Court emphasized that the courts are not free, under the guise of construction, to amend the LHWCA. The Court noted:

> We are aware that [the LHWCA] is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioner's construction would have the effect of extending the limitation indefinitely . . . ; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us. [*Id.*]

The same reasoning applies no less (over forty-four years later) to the construction of the LHWCA by the

Ninth Circuit herein. The Ninth Circuit's construction would have the effect of extending the Section 22 one-year statute of limitations indefinitely. While that may be desirable for LHWCA claimants, the courts do not have the power to rewrite the LHWCA and make what was intended to be a limitation no limitation at all. *See Pillsbury v. United Engineering, supra.*

The Ninth Circuit's decision, which allows nominal awards and preserves indefinitely the right to seek modification, will also substantially increase litigation because it will preserve indefinitely the ability of LHWCA parties to litigate their cases. However, with the 1972 Amendments to the LHWCA, Congress increased the compensation benefits provided to LHWCA claimants and attempted to reduce litigation. *See Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 82-83, 100 S. Ct. 925, 930 (1980). The Court should thus be " . . . unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation. . . . " *Id.* at 86, 100 S. Ct. at 932.

Indeed, the Ninth Circuit has also previously concluded that the avoidance of litigation and efficient administration of the workers' compensation system are important factors which may support or undermine adoption of a particular construction of the LHWCA. *See Todd Shipyards Corp. v. Black*, 717 F. 2d 1280, 1285 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). In the present case, the Ninth Circuit's construction of Section 22 of the LHWCA would increase litigation and interfere with the efficient administration of the LHWCA. Therefore, those factors militate against adoption of the construction of the LHWCA by the Ninth Circuit herein.

Furthermore, Congress could have enacted Section 22 without a statute of limitations or with a longer statute of limitations. Congress certainly knows how to do so. In 1984, Congress extended the statute of limitations for claims for occupational disease beyond one year. *See* 33 U.S.C. § 913(b)(2); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). In 1984, Congress also amended the LHWCA to preserve the timeliness of hearing loss claims filed more than one year after the employee's last exposure. *See* 33 U.S.C. § 908(c)(13)(D); *Bath Iron Works Corp. v. Director, OWCP,* 506 U.S. 153, 113 S. Ct. 692 (1993). Therefore, the Ninth Circuit's decision, which ignores the clear terms of Section 22, improperly nullifies the LHWCA Section 22 statute of limitations under the guise of construction.

Implicit in the Ninth Circuit's decision is the apparent premise that a LHWCA employer is responsible or liable indefinitely for a LHWCA claimant's continued employment after an industrial injury, even after the claimant has returned to regular and continuous employment at wages well in excess of the claimant's pre-injury average weekly wage. However, the LHWCA is a workers' compensation statute and not an unemployment statute. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F. 2d 1031, 1042 (5th Cir. 1981) (the LHWCA employer is not an employment agency); *Pilkington v. Sun Shipbuilding and Dry Dock Company.* 9 BRBS 473, 480 (1978) ("the law . . . does not require that the employer actually find some other employment for the claimant"); *Pernell v. Capitol Hill Masonry,* 11 BRBS 532, 537 (1979) ("it is a workers' compensation statute we are interpreting, not an unemployment compensation statute"); *Devillier v. National*

Steel and Shipbuilding Company, 10 BRBS 649, at 658 (where post-injury employment is sufficiently regular and continues to establish a true wage earning capacity, the claimant "must take [his] chances on unemployment like anyone else"). Unless the Court reverses the mistaken premise that the LHWCA is an unemployment statute, the Ninth Circuit's decision will severely and unfairly impact upon the liability of employers in the ship repair and ship construction industry, which typically are engaged in a cyclical business.

Moreover, the Benefits Review Board ("BRB") has repeatedly expressed its dissatisfaction with *de minimus* awards of benefits, correctly viewing them as judicially created infringements upon the province of Congress because they indefinitely extend the time period provided for modification in Section 22. *See Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988); *Peele v. Newport News Shipbuilding & Dry Dock Company,* 20 BRBS 133 (1987); *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom., Todd Shipyards Corp. v. Director, OWCP,* 792 F.2d 1489 (9th Cir. 1988); *Smith v. Newport News Shipbuilding & Dry Dock Company,* 16 BRBS 287 (1984). The BRB's interpretation is "reasonable and reflects the policy underlying the statute," *see Kaiser Steel Corp. v. Director, OWCP,* 812 F.2d 518, 521 (9th Cir. 1987), and thus should be accorded weight.

Therefore, the Ninth Circuit's decision, which improperly nullifies the statute of limitations in Section 22 as enacted by Congress, should be reversed.[2]

B. Conjecture That A LHWCA Claimant May Possibly Be Laid Off Due To Lack Of Work At Some Indefinite Time In The Future Does Not, As A Matter Of Law, Constitute "Substantial Evidence" Sufficient To Support An Award For Permanent Partial Disability Under The LHWCA.

As noted by this Court, the LHWCA is a " . . . comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . ' " and " . . . compensation, as an initial matter, is predicated on loss of wage-earning capacity. . . . " *Metropolitan Stevedore Company v. Rambo*, ___ U.S. ___, 115 S. Ct. 2144, 2147-2148 (1995). Indeed, "the fundamental purpose of the LHWCA is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury." *Id.* at 2148.

In the present case, it is undisputed from the evidence in the record that Claimant was retrained as a crane operator after his 1980 industrial injury, and that his post-injury wages between 1985 and 1990 were more

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[2] The decisions in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), *Fleetwood v. Newport News Shipbuilding & Dry Dock Company*, 776 F.2d 1225, 1234, n.9 (4th Cir. 1985), and *Lafaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989), which authorize or approve of *de minimis* awards in order to preserve indefinitely a LHWCA claimant's right to seek modification under Section 22, suffer from the same defects.

than three times his pre-injury earnings. *Id.* Based on that record, the ALJ found that Claimant "no longer has a wage-earning capacity loss," and terminated Claimant's disability payments. The BRB affirmed. *Id.* at 2147.

On remand from this Court, the Ninth Circuit noted in part that Claimant was employed as a crane operator and " . . . was earning more [about 300% of his pre-injury average weekly wages] than he had before his injury." *Rambo v. Director, OWCP*, 81 F.3d at 842. The Ninth Circuit nonetheless held that the Claimant was entitled to a "nominal award" for permanent partial disability because Claimant had testified in part that he did not know how long his job as a crane operator would last. *Id.*, 81 F.3d at 844. Relying in part on LHWCA Section 8(h), 33 U.S.C. § 908(h), the Ninth Circuit therefore held that the ALJ's decision to terminate the Claimant's benefits, which was affirmed by the BRB, was not supported by "substantial evidence." *Id.*, at 843-845.

However, it is well-settled that "substantial evidence" means more than a "mere scintilla." It means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). Moreover, substantial evidence is not evidence considered in isolation from that opposing it, but evidence that survives whatever in the record fairly detracts from its weight. *Universal Camera Corp. v. NLRB*, 340 U.S. at 488, 71 S. Ct. at 464.

Substantial evidence also does not include speculation, surmise or conjecture. *Cf. Consolidated Edison Company v. NLRB*, 305 U.S. 197, 230, 59 S. Ct. 206, 217 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *see also White v. Bath Iron Works Corp.*, 7 BRBS 86, 91-92 (1977), *aff'd*, 584 F.2d 569 (1st Cir. 1978) (ALJ's reliance on effect of the claimant's ability to earn wages in the open labor market at "some future date" was speculation). The evidence supporting the decision or order under review "must do more than merely create a suspicion of the existence of facts upon which the order is based. . . . " *NLRB v. O.A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (5th Cir. 1967); *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64 (5th Cir. 1980).

In the case before the Court, the Ninth Circuit in effect issued a *de minimis* or nominal award to Claimant based on conjecture that Claimant may, at some indefinite time in the future, lose his job. However, that reasoning, that Claimant "may" lose his job at some indefinite time in the future, constitutes at best speculation and cannot as a matter of law constitute substantial evidence which

supports an award for permanent partial disability.[3] *Cf. Morrison-Knudsen Construction Company v. Director, OWCP*, 461 U.S. at 624, 103 S. Ct. at 2045 (employee's "expectation interest" in employer contributions to union

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[3] The Ninth Circuit's award of permanent partial disability benefits to an LHWCA claimant who is receiving post-injury wages well in excess of the claimant's pre-injury wages on the grounds that the claimant "may" lose his job at some time in the future is also inconsistent with this Court's mandates in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), and *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312 (1982). In *Greenwich Collieries*, this Court emphasized in part that a LHWCA claimant has the burden of proof, and must meet that burden of proof by a "preponderance of evidence" without the assistance of the "Benefit of Doubt Rule." Thus, a claimant who is working and receiving post-injury wages well in excess of his pre-injury wages does not meet his burden of proof by a preponderance of the evidence in the record considered as a whole based simply on an unsupported claim that he may lose his job at some indefinite time in the future. As the Court has also noted, under Section 8(c)(21), 33 U.S.C. § 908(c)(21), it is necessary for the LHWCA claimant to initially prove that his injury has actually decreased his wage earning capacity. *Cf. Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, ___, 113 S. Ct. 692, 695 (1993). Moreover, in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. at 615, 102 S. Ct. at 1317, the Court emphasized in part that the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. That same reasoning applies no less to the claim of a LHWCA claimant who has returned to work and is regularly and continuously earning wages well in excess of his pre-injury wages. The allegation that such a claimant "may" lose his job at some indefinite time in the future is plainly insufficient to shift the burden of proof to the employer. Indeed, the Ninth Circuit's decision herein also imposes on the employer the "difficult job of proving a negative." *Cf. Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980).

trust funds for health, welfare, pensions and training was "at best speculative" and "unpredictable" and thus could not be included in the definition of wages); *see Bolduc v. General Dynamics Corp.*, 9 BRBS 851 (1979) (mere possibility that the claimant may lose his job is too speculative a basis upon which to award permanent partial disability).

Moreover, the Ninth Circuit's decision authorizes and promotes "protective awards" to LHWCA claimants who in reality do not have a "disability," which is the threshold requirement for an unscheduled award under the LHWCA. *See* 33 U.S.C. §§ 902(10), 908(c)(21); *cf. Potomac Electric Power Company v. Director, OWCP,* 449 U.S. 268, 269, 101 S. Ct. 509, 510 (1980). In a similar context, the BRB and the Fifth Circuit have held that " . . . nothing in the LHWCA or the governing regulations authorizes the filing of protective [LHWCA] claims or even recognizes their existence." *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants,* 17 F. 3d 130, 135 (5th Cir. 1994); *Black v. Bethlehem Steel Corp.,* 16 BRBS 138, 142 (1984).

Similarly, nothing in the LHWCA or the governing regulations authorizes the issuance of "protective awards" in order to preserve a LHWCA claimant's right to seek modification in the future. Section 8(h) only applies after there has been an initial determination that the claimant has sustained a "disability" pursuant to Sections 2(10) and 8(c)(21), 33 U.S.C. §§ 902(10), 908(c)(21). *See Owens v. Traynor,* 274 F. Supp. at 773 (" 'anatomical impairment' is not the same as 'disability' . . . [under the LHWCA]; [Section 8(c)(21)] does not permit the award for permanent partial disability

. . . unless there has been some loss of wage-earning capacity").

Furthermore, the finding of the ALJ in this case that Claimant does not have a wage-earning capacity loss is supported by substantial evidence in the record considered as a whole.[4] That evidence in the record included Claimant's retraining, his reemployment as a crane operator at substantially higher wages than his pre-injury wages and Claimant's continued employment at higher wages (more than 300% of his pre-injury wages) from at least 1985 to 1990.[5] Thus, the Ninth Circuit also erred in engaging in a *de novo* review and reweighing the evidence, and substituting its own views for that of the ALJ as the trier of fact. *See Container Stevedoring Company v. Director, OWCP,* 935 F.2d 1544, 1546 (9th Cir. 1991)

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[4] *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), which used the same approach of the Ninth Circuit in allowing a "nominal award," is distinguishable because in *Hole* the ALJ, as the trier of fact, initially found that the claimant's post-injury earnings did not fairly and reasonably represent the claimant's wage-earning capacity, and that the claimant had a "disability." In the present case, the ALJ found otherwise.

[5] In *Edwards v. Director, OWCP,* 999 F.2d 1374 (9th Cir. 1993), *cert. denied sub nom. Todd Shipyards Corp. v. Edwards,* 114 S. Ct. 1539 (1994), the Ninth Circuit held in part that evidence that a LHWCA claimant had worked for eleven weeks following retraining was insufficient to show suitable alternate employment because eleven weeks of employment did not show that such work was realistically and regularly available. However, in the present case, five years of post-injury employment (at wages well in excess of Claimant's pre-injury wages) showed that such employment was indeed "realistically and regularly available."

(" . . . court cannot substitute its own views for the ALJ's views or engage in *de novo* review of the evidence").[6]

Because the ALJ's decision is supported by substantial evidence in the record considered as a whole and because the Ninth Circuit relied on speculation and improperly substituted its own view of the evidence for that of the ALJ, the Ninth Circuit's decision should be reversed.

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[6] Section 21(b)(3), 33 U.S.C. § 921(b)(3), mandates that the findings of fact in the decision under review of the trier of fact by the BRB shall be "conclusive" if supported by substantial evidence in the record considered as a whole. *See also* 20 C.F.R. § 802.301. That same standard, required of the BRB, also applies to a review by the court of appeals. *See* 33 U.S.C. § 921(c); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S. Ct. 470 (1951); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 85 S. Ct. 1012 (1965). Further, the findings of the BRB may not be disturbed by the court of appeals unless they are unsupported by substantial evidence in the record considered as a whole; the reviewing court's function is exhausted when it appears that there is warrant in the evidence and a reasonable legal basis for the BRB's award. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1333 (9th Cir. 1978), *cert. denied*, 440 U.S. 911, 99 S. Ct. 1223 (1979), *citing to Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469, 479, 67 S. Ct. 801, 807 (1947). In the present case, the Ninth Circuit went beyond that standard of review and drew its own inferences from the record, contrary to the findings of the ALJ.

C. The Ninth Circuit's Decision Is Inconsistent With The Supreme Court's Repeated Mandate That Sympathy Is an Insufficient Basis For Providing A Recovery Not Authorized By Congress.

The primary rationale for the Ninth Circuit's decision, to allow a "nominal" award to a LHWCA claimant who is earning higher wages post injury than his pre-injury average weekly wage, is that such an approach is the " . . . only mechanism available to incorporate the possible future effects of a disability in an award determination." *Rambo*, 81 F.3d at 844. The Ninth Circuit noted that such an approach would indefinitely extend the period for modification pursuant to Section 22, but reasoned that it was nonetheless necessary.[7] *Rambo*, 81 F.3d at 844.

While that is a "laudable concern," the paramount goal of the LHWCA is to compensate for lost earning capacity. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1292 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S. Ct. 1910 (1984). In *Todd Shipyards v. Black, supra*, the Ninth Circuit criticized the BRB's adoption of the Date of Last Exposure Rule for determining average weekly wage in occupational disease cases. The BRB had reasoned that

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[7] The Ninth Circuit's reasoning that such an approach is the only mechanism available to incorporate the possible future effects of a disability (beyond the Section 22 one-year statute of limitations) is plainly wrong. The only mechanism available for such an approach would be action by Congress to amend the LHWCA. *See Director, OWCP v. Rasmussen*, 440 U.S. 29, 47, 99 S. Ct. 903, 913 (1979) (the courts are not free to " . . . rewrite Congress's words").

the Date of Last Exposure Standard would guarantee compensation for workers who are retired when their injuries become manifest. Nevertheless, the Ninth Circuit emphasized that although that was a "laudable concern," the paramount goal of the LHWCA is to compensate for lost earning capacity. *Todd Shipyards v. Black*, 717 F.2d at 1292. That same criticism applies with equal force to the reasoning of the Ninth Circuit in the case before the Court.

Moreover, this Court has repeatedly emphasized that it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results. *Baltimore and Philadelphia Steamboat Company v. Norton*, 284 U.S. 408, 412-413, 52 S. Ct. 187, 188 (1932); *Potomac Electric Power Company v. Director, OWCP* ("PEPCO"), 449 U.S. 268, 283, 101 S. Ct. 509, 517 (1980). In *PEPCO, supra*, the Court emphasized that compelling language in the LHWCA could not be ignored or rewritten because it led to seemingly unjust results and further that sympathy is an insufficient basis for approving a recovery that Congress has not authorized. *PEPCO*, 449 U.S. at 283. Those same admonitions apply herein.

Section 22 is clear on its face and requires that a modification claim be filed within one year of the date of rejection of a claim or the date of the last payment of compensation. 33 U.S.C. § 922. Furthermore, in a "non-scheduled" permanent partial disability case, the LHWCA claimant is only entitled to a compensation award based on "66⅔ percent" of the difference between the claimant's average weekly wage at the time of injury and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such

disability. 33 U.S.C. § 908(c)(21); *cf. Potomac Electric Power Company v. Director, OWCP*, 449 U.S. at 270-271, 101 S. Ct. at 510-511; *Owens v. Traynor*, 274 F. Supp. at 770.

The Ninth Circuit would rewrite the LHWCA statutory scheme enacted by Congress and nonetheless allow a "nominal award" to a LHWCA claimant even when there is no present economic disability. The Ninth Circuit's reasoning, that such an approach is " . . . the only mechanism available to incorporate the possible future effects of a disability in an award determination" is an attempt to rewrite the LHWCA. *Rambo*, 81 F.3d at 844. However, this Court has repeatedly admonished that the courts are not free to rewrite the LHWCA. *See e.g. Director, OWCP v. Rasmussen*, 440 U.S. at 47, 99 S. Ct. at 913 (the courts are not free to " . . . rewrite Congress's words").

On previous occasions, the courts and the BRB have attempted to rewrite the LHWCA in order to avoid harsh and incongruous results or otherwise obviate forfeiture provisions in the LHWCA which might create a trap for the unwary. *See e.g. Cross v. Potomac Electric Power Company*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd sub. nom., Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509 (1980); *O'Leary v. Southeast Stevedoring Company*, 7 BRBS 144 (1977), *aff'd*, 622 F.2d 595 (9th Cir. 1980); *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990), *cert. denied*, 505 U.S. 1218, 112 S. Ct. 3026 (1992).

However, in such cases, this Court has emphasized the " . . . basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."

Estate of Cowart v. Nicklos Drilling Company, 505 U.S. 469, 476, 112 S. Ct. 2589, 2594 (1992); *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. at 283, 101 S. Ct. at 517; *Director OWCP v. Rasmussen*, 440 U.S. at 47, 99 S. Ct. at 913. "[I]t is the duty of the courts to enforce the judgment of the legislature, however much [the courts] might question its wisdom or fairness." *PEPCO*, 505 U.S. at 482, 112 S. Ct. at 2598. Indeed, "[i]f the effects of the [LHWCA] are to be alleviated, that is within the province of the legislature. It is Congress that has the authority to change the statute, not the courts." *PEPCO*, 112 S. Ct. at 2598.

In the present case, the Ninth Circuit has ignored the clear statutory language and attempted to alleviate the effects of the LHWCA Section 22 one-year statute of limitations. However, in so doing, the Ninth Circuit has ignored this Court's repeated mandate and gone well beyond its authority. The Ninth Circuit has also ignored this Court's admonition that "sympathy is an insufficient basis for providing a recovery not authorized by Congress." *PEPCO*, 449 U.S. at 283. The Ninth Circuit's decision attempts to provide a recovery not authorized by Congress and should therefore be reversed.

IV

CONCLUSION

Amicus Curiae NASSCO respectfully submits that the decision of the Ninth Circuit is founded upon an incorrect interpretation of the LHWCA. Had it been the intention of Congress to allow "nominal awards" in order to preserve a LHWCA claimant's right to seek Section 22

modification indefinitely, Congress certainly could have done so. However, Congress has not done so. Section 22 is clear on its face, and the Ninth Circuit does not have the authority to rewrite the LHWCA under the guise of construction.

Amicus Curiae NASSCO respectfully maintains that the Ninth Circuit's grant of a nominal compensation award for permanent partial disability to Claimant, simply in order to preserve the Claimant's right to seek modification under Section 22 indefinitely, is not supported by substantial evidence in the record considered as a whole and is not in accordance with law. NASSCO prays that the Court reverse the decision of the Ninth Circuit.

DATED: January 10, 1997

Respectfully submitted,

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No. 96-272

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METROPOLITAN STEVEDORE COMPANY,
Petitioner,
v.
JOHN RAMBO, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Waterfront Employers, Master Contracting Stevedore Association of the Pacific Coast, Inc., Shipbuilders Council of America, the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amicus curiae* in support of Petitioner, Metropolitan Stevedore Company.

The Petitioner has consented in writing to the filing of a brief *amici curiae* on its behalf. The Federal Respondent has also consented. Letters of consent have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Court. Respondent has not so consented.

The National Association of Waterfront Employers (NAWE), formerly the National Association of Steve-

dores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the Distirct of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon, Washington, Alaska and Hawaii and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 8,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and the largest group self-insurance facility authorized to write LHWCA coverage, and thus have an interest in the proper payment of disability benefits to a claimant whose original award is modified due of an increased wage-earning capacity. These *amici* also participated as *amicus* in *Metropolitan Stevedore Company v. Rambo* (*Rambo I*), —— U.S. ——, 115 S.Ct. 2144 (1955).

Accordingly *amici* respectfully move for leave to file the attached brief *amici curiae* in support of the Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-272

METROPOLITAN STEVEDORE COMPANY,
Petitioner,

v.

JOHN RAMBO, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS, MASTER CONTRACTING STEVEDORE ASSOCIATION OF THE PACIFIC COAST, INC., SHIPBUILDERS COUNCIL OF AMERICA, THE ALLIANCE OF AMERICAN INSURERS, AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The National Association of Waterfront Employers (NAWE), formerly the National Association of Stevedores (NAS), is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade association organized under the laws of the District of Columbia whose 33 member companies are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth

of Puerto Rico. With the exception of the Puerto Rico members, every NAWE member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Master Contracting Stevedoring Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon, Washington, Alaska and Hawaii and provide substantially all the marine terminal and stevedoing services performed by privte contractors to oceangoing vessels calling at ports in those states. MCSA member companies employ a work force of approximately 8,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of 214 insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation

Act and the largest group self-insurance facility authorized to write LHWCA coverage, and thus have an interest in the proper payment of disability benefits to a claimant whose original award is modified due of an increased wage-earning capacity. These *amici* also participated as *amicus* in *Metropolitan Stevedoring Company v. Rambo* (*Rambo I*), —— U.S. ——, 115 S.Ct. 2144 (1995).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below, reading into § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act") a non-existent provision for a "nominal award," ignores the plain text of the statute and Congressional intent. The court exceeded its review authority under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, by not considering the record as a whole, ignored the APA's evidentiary requirements, and usurped the policy making role of the Congress in violation of the separation of powers doctrine of the Constitution.

ARGUMENT

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA"—"Act"), is a federal workers' compensation statute designed to provide indemnity compensation and medical benefits to certain classes of maritime employees injured on covered worksites. *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249 (1977). LHWCA § 8, 33 U.S.C. § 908, sets forth four distinct classifications of indemnity benefits, labeled "disability" benefits, designed to recompense disabled workers according to the severity and length of their disabilities. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980).

In turn, LHWCA § 2(10) expressly defines the term "disability" to mean, in pertinent part, "incapacity because

of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment [.]"

This wage-earning capacity concept is found throughout § 8 of the Act. Congress expressly incorporated it into the two disability classifications that are "partial" in character, including that governing an award of permanent partial benefits, the type of award made in satisfaction of Respondent's initial claim.[1] A change in conditions, including a change in claimant's economic condition, e.g., an increased wage-earning capacity, permits a LHWCA § 22 modification request. *Metropolitan Stevedore Co. v. Rambo,* —— U.S. —— (1995) (*"Rambo I"*).

In analyzing an initial claim for § 8 disability or a § 22 request for modification, the Department of Labor applies the essential wage-earning capacity factors found in LHWCA § 8(h), including the economic factors allowed by this Court in *Rambo I.*[2] Actual earnings is the

[1] The statutory definitions read as follows: "In all other cases in the class of [permanent partial] disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21); "Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years." LHWCA § 8(e), 33 U.S.C. § 908(e).

[2] Many elements of the Department of Labor are involved in the LHWCA statutory scheme. Disputed claims are initially decided by an ALJ. Review is to the Benefits Review Board ("BRB"). The Act is administered, however, by the Director, Office of Workers' Compensation Programs ("OWCP"). See *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* —— U.S. ——, 115 S.Ct. 1278 (1995).

starting point, with the Department of Labor required to consider the complete range of statutory factors if such earnings do not fairly and reasonably represent a claimant's wage-earning capacity. These factors include "the nature of [ ] injury, the degree of physical impairment, [the claimant's] usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition[]" and fix such capacity "in the interests of justice." Notably, the Department is authorized to take into account the effect of a disability "as it may naturally extend into the future.[3]

The text of the Act describing each of these disability classifications, other than the section dealing with a permanent total disability, expressly requires payment of the specified benefit, but only "during the continuance" of the disability, i.e., the "incapacity . . . to earn the wages which the employee was receiving at the time of injury at the same or any other employment." See LHWCA §§ 8(b), 8(c)(21), and 8(e). This limitation on benefit payments has been an integral part of the Act since its enactment in 1927, and was recognized by this Court in *Rambo I,* Slip Opinion at 6.

Moreover, as this Court recognized in *Rambo I,* a § 22 modification must be requested within one year of the last payment of compensation. The Act makes no provision for a "nominal award" designed to extend indefinitely the modification period.[4]

[3] Accordingly, under certain conditions, a claimant may be found to be disabled, either at an initial hearing or at a § 22 modification proceeding, and given an award even though he has actual wages because, after considering all of § 8(h)'s economic factors, the claimant is deemed to be without his wage-earning capacity at the time of the injury. The concept of a "nominal award," on the other hand, presupposes no loss of wage earning capacity.

[4] Under current practice the Respondent could claim a reduced wage earning capacity even at or after retirement. Unlike approximately one half of the state compensation acts and the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.,* the LHWCA

The Circuit Court, however, disregarded these statutory limitations and directed the Benefits Review Board to award a "nominal award" because *it* perceived a "significant possibility" that Respondent will at some future time suffer economic harm even though the trier of fact perceived no such possibility. Thus, the court has laid down a rule of law equally applicable to every § 22 request to modify an award of permanent benefits. In so doing the court exceeded its review authority under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, ignored the evidentiary provisions of the APA, and usurped the policy making role of the Congress.

I. THE DECISION BELOW VIOLATES TWO CRITICAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT: THE § 706 STANDARDS GOVERNING JUDICIAL REVIEW AND THE § 556(d) STANDARDS GOVERNING THE BURDEN OF PROOF AND EVIDENCE.

A. The Court Below Ignored the Whole Record and Substituted Its Judgment for That of the Administrative Factfinder in Violation of the Standards Governing Judicial Review.

Appellate review of a BRB decision is governed by the APA's review standards set forth at 5 U.S.C. § 706. The Court below rested its decision on its belief that the ALJ/BRB decision under review was not supported by the substantial evidence test set forth at 5 U.S.C. § 706 (2)(E). However, this belief and decision are not supported by the facts in this case.

In a review of an administrative adjudication, this court has held that the record must be considered as a whole, *Universal Camera v. NLRB*, 340 U.S. 474 (1951). Moreover, the reviewing court's scope of review under this provision of the APA is narrow and limited solely

does not require an election, a cessation of benefits, or a credit for employer funded pension and social security payments, at retirement.

to the question of whether or not the decision was supported by substantial evidence.

The ALJ below concluded that Respondent, trained in a new and more financially rewarding profession, no longer has an incapacity to earn the wages he was receiving at the time of his injury. Therefore, under the statutory scheme and definitions pointed out above, the ALJ concluded that the Respondent is no longer disabled and is ineligible for benefit payments of any amount. However, the circuit court ignored the factfinder's evaluation of Respondent's increased wage earning capacity and job market potential. Instead, it rested its decision on one highly speculative "fact": "Rambo testified that he didn't know how long his job as a crane operator would last." The court concluded that the ALJ overemphasized Respondent's current status and failed to consider the effect of his permanent partial disability on his future earnings.

Amici suggest that the court's analysis can hardly be construed as meeting *Universal Camera's* requisite directive to examine the whole record.[5] In fact, the court's analysis appears to be akin to a *de novo* review, substituting speculative thought for the substantial evidence of the greatly increased wage-earning capacity relied upon by the BRB and the ALJ.[6] If not an outright *de novo* review, it appears to *Amici* that the court resorted to

[5] *Amici* also note that this Court appears to have no problems with the ALJ's substantial evidence analysis, which took into account the whole record: "[T]he ALJ, recognizing that higher wages do not necessarily prove an increase in wage-earning capacity, *took care to account for* inflation and risk of job loss . . ." *Rambo I* (slip opinion at 10) (emphasis added).

[6] This Court has permitted *de novo* review under § 706 in only two circumstances, one of which is only applicable to a rulemaking proceeding. *De novo* review of whether or not the BRB decision was unwarranted by the facts is authorized by § 706(2)(F) when the proceeding is adjudicatory and the agency factfinding procedures are inadequate. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

devising its own evidence on the effects of Respondent's injury on his future earnings, even though virtually nothing was offered by way of evidence at the administrative level.

B. The Ninth Circuit's Decision Violates the APA by Placing the Burden of Persuasion on the Wrong Party and Substituting Speculation for the Substantial Evidence Standard.

LHWCA administrative adjudications are governed by the APA. LHWCA § 19(d) specifically requires that all LHWCA hearings be conducted in accordance with 5 U.S.C. § 554 and those additional APA sections incorporated by reference to § 554. 33 U.S.C. § 919(d).

In turn the APA requires that all LHWCA adjudications rest on substantial evidence. 5 U.S.C. § 556(d). The trier of fact may not make an award unless it meets the substantial evidence threshold. Moreover, as this Court recently held, § 556(d) also places the burden of persuasion on the party seeking an award or other order during a dispute over an award. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, —— U.S. ——, 114 S.Ct. 2251 (1994).

At the initial claim stage it is the claimant who bears the burden of persuasion to prove all of the necessary elements of his claim. Likewise an employer seeking a § 22 modification because of a "change in conditions" must bear the burden of proving to the satisfaction of the trier of fact that a claimant's "incapacity to earn wages" has changed sufficiently for a new order to be issued.

Just as clearly, a claimant seeking to retain a "nominal award" during a § 22 modification proceeding because of a "significant possibility" of future economic harm bears the burden of persuasion. It appears to *Amici* that the issue of future harm, raised below by the Respondent during the initial hearing although not supported by any hard evidence, was completely discounted by the ALJ.

The circuit court chose to ignore the entire matter of proof and evidence, instead ordering the BRB to award a nominal sum as a matter of law. This, too, runs contrary to this Court's decision in *Rambo I*: "[L]oss of wage-earning capacity is an element of the claimant's case . . . *a claimant is not 'disabled' unless he proves 'incapacity because of injury to earn the wages.'*" (Slip opinion at 5) (emphasis added).

II. THE NINTH CIRCUIT SUBSTITUTED ITS JUDGMENT FOR THAT OF CONGRESS, THUS USURPING THE POLICY MAKING ROLE OF CONGRESS.

The concept of a "nominal award" is not to be found in the Act or in corresponding OWCP regulations.[7] The court ignored the evidence credited by the ALJ and BRB, and handed down its own rule of law based on conjecture. This "rule" is equally applicable to every other request to modify an award for permanent disability benefits.

Amici realize that § 22's one year time limitation in practice may well be a strict rule. However, it is the rule that Congress has chosen.[8] Judicial amelioration diminishes the prospect of Congressional oversight and legislative correction. Ultimately it serves neither the interests of employers or employees covered by the Act.

However, in spite of Congress' express and clear rule, the circuit court chose to rest its decision on *its* judgment

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[7] The position advanced on behalf of the Director, OWCP is yet another in a long string of departmental litigating positions. It finds no support in the text of the statute or in OWCP regulations. While it has been accepted by several circuit courts over the years, the department's refusal to incorporate this judicial "mechanism" into its regulations reflects the Department's continuing disdain for the rulemaking processes required by the APA.

[8] As recently as 1984 Congress considered—but rejected—changing LHWCA § 22 and § 8(h) in a way that would have permitted Respondent to seek a § 22 modification in his own right at any point in the future. See S. Rept. 98-81 (May 10, 1983), pp. 37-38. However, the proposed changes discussed here were never enacted.

of what constitutes proper LHWCA legislative policy. In so doing the court usurped the policy making role of Congress in clear violation of the Constitution's separation of powers doctrine.

CONCLUSION

Amici respectfully submit that the decision of the U.S. Court of Appeals for the Ninth Circuit exceeds its statutory review authority, ignores the crucial evidentiary elements of the APA, and usurps the policy-making role of Congress, and therefore must be reversed.

Respectfully submitted,

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